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No. 3986

1342

1342

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANK KELLY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3986

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare, authenticate and certify for filing in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the writ of error heretofore issued in the above-entitled cause, the following papers, pleadings and records on file in said case, to wit:

1. This praecipe.
2. Bill of exceptions.
3. Order settling and certifying bill of exceptions.
4. Minute order continuing cause over the term.
5. Assignment of errors.
6. Petition for writ of error.
7. Order allowing writ of error.
8. Appearance bond upon writ of error (approved).
9. Cost bond upon writ of error (approved).
10. Writ of error.
11. Citation on writ of error (original).
12. Citation on writ of error (served copy).

Dated at Valdez, Alaska, this 23d day of January, 1923.

AARON E. RUCKER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 3, 1923. W. N. Cuddy, Clerk. [1*]

Names and Addresses of Attorneys of Record.

SHERMAN DUGGAN, United States Attorney, and His Assistants, H. G. McCAIN, of Valdez, Alaska, and JULIEN A. HURLEY, of Anchorage, Alaska,

Attorneys for Plaintiff and Defendant in Error.

J. C. MURPHY and JOHN F. COFFEY, of Anchorage, Alaska, L. V. RAY and LEOPOLD DAVID, of Seward and Anchorage, Alaska, AARON E. RUCKER, of Seward, Alaska,

Attorneys for Defendant and Plaintiff in Error. [2]

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*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska,
Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Bill of Exceptions.

Comes now the above-named defendant and being about to prosecute to the United States Circuit Court of Appeals for the Ninth Circuit a writ of error upon the judgment made and entered by the above-named District Court in the above-entitled cause on the 3d day of March, 1922, prays an order of the said District Court, or of the Honorable E. E. Ritchie, Judge thereof, who presided at the trial of said cause and who made and rendered said judgment aforesaid, that this bill of exceptions, containing the following named papers, pleadings, proceedings and exceptions in said cause, be filed, settled and certified to as said defendant's bill of exceptions upon said writ of error, to wit:

1. Indictment.
2. Transcript of testimony.
3. Instructions of the Court to the jury.
4. Requested instructions, refused, and exceptions thereto.
5. Verdict.

6. Motion in arrest of judgment.
7. Motion for new trial and affidavits in support thereof.
8. Counter-affidavits upon motion for new trial.
9. Minute order denying motion in arrest of judgment and motion for new trial and exceptions thereto.
10. Judgment and sentence.
11. Statement of Court *re* judgment and sentence.
12. Motion to vacate judgment and affidavits in support thereof. [3]
13. Counter-affidavit upon motion to vacate judgment.
14. Minute order denying motion to vacate judgment.
15. Stipulation *re* certain original exhibits.
16. Order *re* certain original exhibits.

True, full and correct copies of all of which said papers, pleadings, proceedings and exceptions are hereto attached and are by reference herein inserted in this bill of exceptions.

The defendant, Frank Kelly, prays the judgment and sentence made and pronounced on March 3d, 1922, may be reversed and vacated.

Dated at Seward, Alaska, this 23d day of Jan., 1923.

MURPHY & COFFEY,
RAY & DAVID,
AARON E. RUCKER,
Attorneys for Defendant.

Service of proposed bill of exceptions by copy thereof admitted this 23d day of January, 1923.

SHERMAN DUGGAN,
United States Attorney.

Filed in the District Court, Territory of Alaska, Third Division. Jan. 23, 1923. W. N. Cuddy, Clerk. By ————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 3, 1923. W. N. Cuddy, Clerk. By ————, Deputy. [4]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY and MRS. GRACE KELLY.

Indictment.

Frank Kelly and Mrs. Grace Kelly are accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment of the crime of causing girls to be transported in interstate commerce for the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly, on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully, willfully, knowingly, and feloniously cause

to be transported in interstate commerce, to wit, from the City of Seattle, in the State of Washington, to the City of Anchorage, in the Territory of Alaska, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," two girls of the names of Mildred Hilkert and Margaret Hilkert, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, to induce and entice the said Mildred Hilkert and Margaret Hilkert to become prostitutes, and to give themselves up to debauchery, and to engage in other immoral practices, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United State of America.

SECOND COUNT.

And the said Frank Kelly and Mrs. Grace Kelly are further accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment, of the crime of aiding and assisting in obtaining [5] transportation for girls in interstate commerce for the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly, on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully, willfully, knowingly, and feloniously aid and assist in obtaining transportation for girls in interstate commerce, to wit, from the City of Seattle, in the State of Washington, to the City of Anchorage, in the Territory of Alaska, on a vessel of the Alaska Steamship Company, to wit, the steamship

"Alameda," two girls of the names of Mildred Hilkert and Margaret Hilkert, respectively, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, to induce and entice the said Mildred Hilkert and Margaret Hilkert to become prostitutes, and to give themselves up to debauchery, and to engage in other immoral practices, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the said Frank Kelly and Mrs. Grace Kelly are further accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment of the crime of procuring and obtaining tickets for the transportation of girls in interstate commerce for the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly, on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully, willfully, knowingly, and feloniously procure and obtain tickets to be used, and which were used, by girls of the names of Mildred Hilkert and Margaret Hilkert, respectively, in interstate commerce, to wit, from the City of Seattle, in the State of Washington, to the City of [6] Anchorage in the Territory of Alaska, Third Division, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," in going to the said City of Anchorage, in the Territory and Division afore-

said, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, to induce and entice the said Mildred Hilkert and Margaret Hilkert to give themselves up to the practice of prostitution, and to give themselves up to debauchery and other immoral practices, whereby the said Mildred Hilkert and Margaret Hilkert, were transported in interstate commerce from the City of Seattle in the State of Washington to the City of Anchorage, in the Territory of Alaska, Third Division, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the said Frank Kelly and Mrs. Grace Kelly are further accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment, of the crime of causing to be procured and obtained tickets for the transportation of girls in interstate commerce for the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly, on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully, willfully, knowingly, and feloniously cause to be procured and obtained tickets to be used, and which were used, by two girls of the names of Mildred Hilkert and Margaret Hilkert, respectively, in interstate commerce, to wit, from the City of Seattle,

in the State of Washington, to the City of [7] Anchorage, in the Territory of Alaska, Third Division, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," in going to the City of Anchorage, in the Territory and Division aforesaid, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, to induce and entice the said Mildred Hilkert and Margaret Hilkert to give themselves up to the practice of prostitution, and to give themselves up to debauchery and other immoral practices, whereby the said Mildred Hilkert and Margaret Hilkert were transported in interstate commerce from the City of Seattle in the State of Washington, to the City of Anchorage, in the Territory of Alaska, Third Division, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the said Frank Kelly and Mrs. Grace Kelly are further accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment, of the crime of aiding and assisting in procuring and obtaining tickets for the transportation of girls in interstate commerce for the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly, on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully,

willfully, knowingly, and feloniously aid and assist in procuring and obtaining tickets to be used, and which were used, by two girls of the names of Mildred Hilkert and Margaret Hilkert, respectively, in interstate commerce, to wit, from the City of Seattle, in the State of Washington, to the City of Anchorage, in the Territory of Alaska, Third Division, [8] on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," in going to the City of Anchorage, in the Territory of Alaska, Third Division, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, to induce and entice the said Mildred Hilkert and Margaret Hilkert to give themselves up to the practice of prostitution, and to give themselves up to debauchery and other immoral practices, whereby the said Mildred Hilkert and Margaret Hilkert were transported in interstate commerce from the City of Seattle in the State of Washington, to the City of Anchorage, in the Territory of Alaska, Third Division, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SIXTH COUNT.

And the said Frank Kelly and Mrs. Grace Kelly are further accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment, of the crime of persuading, inducing and enticing girls to travel in interstate commerce for

the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly, on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully, willfully, knowingly, and feloniously persuade, induce and entice two girls of the names of Mildred Hilkert and Margaret Hilkert to go from one place to another in interstate commerce, to wit, to go from the City of Seattle, in the State of Washington, to the City of Anchorage, Territory of Alaska, Third Division, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, that the said Mildred Hilkert and Margaret Hilkert [9] should engage in the practice of prostitution and debauchery and other immoral practices, and the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, unlawfully, willfully, knowingly, and feloniously did thereby cause and aid and assist in causing the said Mildred Hilkert and Margaret Hilkert to go and be carried and transported as passengers on the line and route of a common carrier and carriers in interstate commerce, to wit, from the City of Seattle, in the State of Washington, to the City of Anchorage, in the Territory of Alaska, Third Division, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SEVENTH COUNT.

And the said Frank Kelly and Mrs. Grace Kelly

are further accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment, of the crime of causing girls to be persuaded, induced and enticed to travel in interstate commerce for the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly, on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully, willfully, knowingly, and feloniously cause to be persuaded, induced and enticed two girls of the names of Mildred Hilkert and Margaret Hilkert to go from one place to another in interstate commerce, to wit, to go from the City of Seattle, in the State of Washington, to the City of Anchorage, in the Territory of Alaska, Third Division, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, that the said Mildred Hilkert and Margaret Hilkert should engage in the practice of prostitution and debauchery [10] and other immoral practices, and the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, unlawfully, willfully, knowingly and feloniously did thereby cause and aid and assist in causing the said Mildred Hilkert and Margaret Hilkert to go and be carried and transported as passengers on the line and route of a common carrier and carriers in interstate commerce, to wit, from the City of Seattle, in the State of Washington, to the City of Anchorage in the Territory of Alaska, Third Division, on a vessel of the Alaska

Steamship Company, to wit, the Steamship "Alameda," contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

EIGHTH COUNT.

And the said Frank Kelly and Mrs. Grace Kelly are further accused by the Grand Jury of the Territory of Alaska, Third Division, by this indictment, of the crime of aiding and assisting in persuading, inducing, and enticing girls to travel in interstate commerce for the purposes of prostitution, committed as follows:

The said Frank Kelly and Mrs. Grace Kelly on the 3d day of August, 1921, at Anchorage, in the Territory of Alaska, Third Division, did unlawfully, willfully, knowingly, and feloniously aid and assist in persuading, inducing, and enticing two girls by the names of Mildred Hilkert and Margaret Hilkert to go from one place to another in interstate commerce, to wit, to go from the City of Seattle, in the State of Washington, to the City of Anchorage, in the Territory of Alaska, Third Division, with the intent and purpose on the part of them, the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, that the said Mildred Hilkert and Margaret Hilkert should engage in the practice of prostitution and debauchery and other immoral practices and the said Frank Kelly and Mrs. Grace Kelly, defendants aforesaid, [11] unlawfully, willfully, knowingly and feloniously did thereby cause and aid and assist in causing the said Mildred Hilkert and Margaret Hilkert to go

and be carried and transported as passengers on the line and route of a common carrier and carriers in interstate commerce, to wit, from the City of Seattle, in the State of Washington, to the City of Anchorage, in the Territory of Alaska, Third Division, on a vessel of the Alaska Steamship Company, to wit, the steamship "Alameda," contrary to the form and statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Valdez, in the Territory of Alaska, Third Division, this twenty-fifth day of October, nineteen hundred and twenty-one.

SHERMAN DUGGAN,
United States Attorney.

[Endorsed]: No. ——. Criminal. District Court, Territory of Alaska, Third Division. The United States of America vs. Frank Kelly and Mrs. Grace Kelly. Indictment: Violation White Slave Traffic Act. A True Bill. Nels. Jepson, Foreman. Presented to the Court by the Foreman of the Grand Jury in Open Court, in the Presence of the Grand Jury and Filed in the District Court, Territory of Alaska, Third Division. Oct. 26, 1921. W. N. Cuddy, Clerk. Aaron E. Rucker, Deputy.

Witnesses before Grand Jury: Mildred Hilkert, Margaret Hilkert and Peter Cook. [12]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY and MRS. GRACE KELLY, Defendants.

Transcript of Evidence.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard at Anchorage, in said Third Division, Territory of Alaska, on Monday, February 20, 1922, before the Honorable E. E. RITCHIE, Judge of said court, and a Jury.

The Government being represented by Honorable SHERMAN DUGGAN, United States Attorney, and Messrs. JULIEN HURLEY and HARRY G. McCAIN, Assistant United States Attorneys.

The defendants being represented by their counsel and attorneys, Messrs. MURPHY & COFFEY and L. V. RAY.

The jury having been empaneled and sworn, opening statements were made by Mr. Duggan on behalf of the Government and by Mr. Murphy on behalf of the defendants.

WHEREUPON, the following additional proceedings were had and done, to wit: [13]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY and MRS. GRACE KELLY, Defendants.

INDEX.

PLAINTIFF'S EXHIBITS:

[14]

Testimony of Peter A. Cook, for the Government.

PETER A. COOK, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. What is your name? A. Peter A. Cook.

Q. Where do you live? A. Anchorage.

Q. What, if any, official position do you hold?

A. Operator in charge of the telegraph office.

Q. As such have you the custody of messages sent and received? A. Yes, sir.

Q. Have you also the custody of receipts for messages delivered? A. Yes, sir.

Q. Have you in your custody a message dated on or about August 1, 1921, signed by Ragtime Kelly, addressed to Mildred Hilkert, Normandie Apartments, Seattle, Washington? A. Yes, sir.

Q. Was that message delivered to you for the purpose of transmission? A. It was; yes.

Q. Was it transmitted? A. It was.

Mr. RAY.—Who delivered the message to you?

(Testimony of Peter A. Cook.)

The WITNESS.—Well, I couldn't swear to that but I think it was Frank Kelly himself brought it in; I am not positive at this time.

Q. Have you that message with you? A. Yes.

Q. Will you produce it?

A. Yes, sir. (Witness produces paper and hands to Mr. Duggan.) [15—2]

Mr. DUGGAN.—We now offer in evidence message dated August 1, 1921, purported to have been signed by Ragtime Kelly, addressed to Mildred Hilkert.

The message is admitted in evidence, without objection, marked Plaintiff's Exhibit "A" and is read to the jury by Mr. Duggan. The exhibit reads as follows:

Government's Exhibit "A."

Anchorage, August 1, 1921.

Mildred Hilkert,

Normandie Apts., Seattle, Wash.

Fred Waller just arrived in Anchorage and spoke to me about you and your sister wanting to come to Anchorage. Let me know at once your lowest salary for you and your sister per week to work for me, you play the piano and sing and sister help you also. Will advance your transportation and you both pay five dollars per week till transportation is paid out. Answer quick—fall and winter engagement.

RAGTIME KELLY.

(Testimony of Peter A. Cook.)

Q. Mr. Cook, was there an answer received to that message?

Mr. RAY.—I want to ask the witness a question —Mr. Cook, do you know to whom that message was delivered?

The WITNESS.—In Seattle?

Mr. RAY.—Yes.

The WITNESS.—No, I do not.

Q. Was there any message came about that time signed Mildred Hilkert, addressed to Ragtime Kelly?

A. There was one I suppose was from her—the name is evidently balled up, but it is evidently an answer to the one sent.

The COURT.—I understand the name is not spelled correctly?

The WITNESS.—No.

Q. Have you that message?

A. Yes, sir. (Witness hands paper to Mr. Duggan.)

Q. This is not the message delivered here?

A. That is the message delivered here.

Q. Is this the message delivered or a copy of it? [16—3]

A. That is a copy.

Q. Have you the receipts for messages delivered?

A. Yes.

Q. On or about the second day of August, 1921, was there a message delivered to Frank Kelly or Ragtime Kelly?

Mr. RAY.—We object to that as not the best evidence.

(Testimony of Peter A. Cook.)

The COURT.—It may be admitted at this time. Of course if you fail to connect it with the necessary testimony to identify it, the testimony will have to be stricken later. I think you should identify the message a little further in your question but the objection will be overruled.

(Defendants allowed an exception to the ruling.)

A. Yes.

Q. Is this a copy of the message delivered at that time?

A. That is a carbon copy of the message delivered.

Q. Who has the original message?

A. It was delivered to Frank Kelly.

Mr. DUGGAN.—I now offer in evidence copy of an original message from Mildred Hilkert to Ragtime Kelly, Anchorage, dated August 2, 1921.

Mr. RAY.—I should like to ask the witness a few questions.

The COURT.—Very well.

(Questions by Mr. RAY.)

Q. This shows the delivery of the original of this message to Kelly? A. Yes.

Q. You don't say that you delivered the message personally?

A. It happened in this case that I did.

Q. Your receipt would show that fact also?

A. No, it would show that Kelly received it, that is all—it don't show who delivered it.

Q. The message came and was delivered? [17—4] A. Yes, sir.

(Testimony of Peter A. Cook.)

Q. And that is the record of your office?

A. Yes, sir.

Mr. RAY.—We have no objection to the offer.

The COURT.—This is the carbon copy retained in your office—the original was delivered to Mr. Kelly?

The WITNESS.—Yes, sir.

The message is admitted in evidence, marked Government's Exhibit "B" and read to the jury by Mr. Duggan. The exhibit reads as follows:

Government's Exhibit "B."

Seattle, Wn. Aug. 2, 1921.

Ragtime Kelly,

Anchorage.

Twenty-five per week for self twenty for sister. Can leave as soon as transportation arrives. Answer at once.

MILDRED HILKUT.

Direct Examination by Mr. DUGGAN (Continued).

Q. Will you produce the receipt for the delivery of the message?

A. Yes, sir—it is the last one on the bottom. (Handing paper to Mr. Duggan.)

Q. Calling your attention to the writing on the last line, on the bottom of this sheet—whose name is that? A. That is Kelly.

Q. Is this the receipt for the delivery of the message, the copy of which was just introduced?

A. Yes.

Mr. DUGGAN.—We now offer the writing on the

(Testimony of Peter A. Cook.)

last line from the bottom of this sheet, showing the delivery of the message.

Mr. RAY.—I presume the whole sheet will have to be offered?

The COURT.—Yes.

The sheet is admitted in evidence, marked Government's Exhibit "C," the last line of which reads: [18—5]

Government's Exhibit "C."

Number Message	Address	Charges	Received by	Time Delvd.
55	Kelly	3.72	Kelly	8:20 P

Q. Now, Mr. Cook, about that time was there any further message sent by the defendant Frank Kelly or Ragtime Kelly—delivered at your office by Frank Kelly or Ragtime Kelly, addressed to Mildred Hilkert, Seattle, Washington?

A. Yes, sir.

Q. What was done with the message?

A. It was sent.

Q. Have you that message? A. Yes, sir.

Q. Will you produce it?

A. Yes, sir. (Handing paper to Mr. Duggan.)

Mr. DUGGAN.—I offer this in evidence as Exhibit "D," purporting to be a message from Ragtime Kelly to Mildred Hilkert dated August 3, 1921.

Mr. RAY.—I want to ask a few questions.

(Questions by Mr. RAY.)

Q. As I understand, the message concerning

(Testimony of Peter A. Cook.)

which Mr. Duggan is now inquiring was transmitted by you? A. Yes, sir.

Q. Do you know the signature to the message—do you know who signed the message?

A. No, I do not know who signed it.

Q. Who brought the message in?

A. It was either Frank Kelly or Mrs. Kelly, I am not sure which.

Q. It came from one of these defendants?

A. I couldn't swear to that at this time. It was brought into the office, that is all I know, but I couldn't swear as to who brought it in now. [19—6]

Mr. RAY.—We object to the introduction of this message on the ground that it is not shown that the defendants, or either of them, sent this message, brought it in or signed it.

The COURT.—That is true; unless the witness can identify the person who brought it in, it will have to be proven in another way.

Mr. RAY.—I will withdraw the objection.

The message is admitted in evidence, marked Government's Exhibit "D" and read to the jury by Mr. Duggan. The exhibit reads as follows:

Government's Exhibit "D."

Anchorage, Alaska, ———, 192—

Mildred Hilkert,

Normandie Apts., Seattle, Wash.

I am wiring two tickets for next Alameda.

RAGTIME KELLY.

Several days after the third of August, some-

(Testimony of Peter A. Cook.)

where about the 8th or 9th, was there a message filed in your office by P. B. Coe, agent of the Alaska Steamship Company at Anchorage, addressed to Henroid, agent of the same company at Seattle, in regard to transportation for Mildred and Margaret Hilkert?

A. There was one filed on August third.

Q. Have you that message? A. Yes.

Q. Will you produce it?

A. Yes, sir. (Hands paper to Mr. Duggan.)

Q. Who filed that?

A. I think it was Mr. Coe himself but I couldn't swear to that either. He might have sent it in but I think it was Mr. Coe himself that filed it.

Mr. DUGGAN.—We offer this in evidence.

The message is admitted as Government's Exhibit "E" and read to the jury by Mr. Duggan. The exhibit reads as follows: [20—7]

Government's Exhibit "E."

NITE LETTER 40 Pd.

Anchorage, Alaska, Aug. 3, 1921.

G. F. Henrioud,
Alaska Steamship Co.,
Seattle, Wash.

Notify by telephone and furnish Mildred Hilkut and sister Normandy Apartments upper deck tickets if possible otherwise lower deck Seattle to Anchorage on Alameda sailing from Seattle August ninth Stop Value hundred sixty-nine dollars and fifty-six cents. Debit me.

P. B. COE.

(Testimony of Paul Brooks Coe.)

Mr. DUGGAN.—That is all.

Mr. RAY.—We have no cross-examination.

Witness excused. [21—8]

Testimony of Paul Brooks Coe, for the Government.

PAUL BROOKS COE, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. State your name.

A. Paul Brooks Coe.

Q. On or about the third day of August, 1921, where were you living? A. At Anchorage.

Q. What, if any, position did you hold at that time?

A. Local agent for the Alaska Steamship Co.

Q. Is the Alaska Steamship Co. the owner of the ship called the "Alameda"?

A. As far as I know they are.

Q. Who operates it?

A. The Alaska Steamship Co.

Q. On or about August 3, 1921, did you deliver a message at the telegraph office of the Alaska Engineering Commission at Anchorage, Alaska, signed by yourself, addressed to G. F. Henrioud, Alaska Steamship Company, Seattle, Washington, regarding transportation? A. I did.

Q. Is that the message? (Handing witness paper.) A. Yes, sir.

Q. How did you happen to send that message?

Mr. RAY.—We object to that.

(Testimony of Paul Brooks Coe.)

Objection overruled; defendants allowed an exception.

A. I was requested to send it.

Q. By whom? A. By Mr. Kelly.

Q. What was the substance of the conversation.

Mr. RAY.—Objected to. [22—9]

Objection overruled; defendants allowed an exception.

A. Well, he came in either that morning or the day before, I forget which, and asked if such a thing was possible, that he could arrange the transportation here,—get the tickets and authorize the agent at Seattle to issue them, and he came in either the next day or later in the afternoon and had it done.

Q. Did he at this time pay any money?

A. Not the first time.

Q. At the time that this message was sent, did he pay any money?

A. Certainly—I collected the money before I sent the message.

Q. What was that money collected for?

A. For the fare, for the tickets.

Q. For whom?

A. For Mildred Hilkert and sister.

Q. Where from?

A. From Seattle, Washington.

Mr. DUGGAN.—That is all.

Mr. RAY.—What did you say the name of the lady was?

A. According to the telegram it was Mildred Kilkut.

Witness excused. [23—10]

Testimony of W. H. Ludin, for the Government.

W. H. LUDIN, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. What is your name? A. W. H. Ludin.

Q. Where do you live? A. Seattle.

Q. What, if any, position do you hold in Seattle?

A. City passenger agent for the Alaska Steamship Co.

Q. As such are you the custodian of transportation records in the office? A. Yes, sir.

Q. On or about the third day of August, 1921, did your office receive a telegram from P. B. Coe authorizing you to furnish any tickets?

A. Yes, sir.

Q. Have you the telegram received?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir. (Witness does so and hands to Mr. Duggan.)

Q. You know that this telegram was received by your office? A. Yes.

Q. How? A. Because I receipted for it myself.

Mr. DUGGAN.—I now offer in evidence telegram identical with Government's Exhibit "E," being the received message.

Mr. RAY.—Are you offering the message or the memoranda on it?

Mr. DUGGAN.—Just the message at this time.

The message is admitted without objection,

(Testimony of W. H. Ludin.)

marked Government's Exhibit "F" and is identical with Government's Exhibit "E," which appears on page 8 of this record. [24—11]

Q. Who handled the transaction there?

A. I did.

Q. What did you do on receipt of this message?

A. I immediately called up the Normandie Apartments and talked with one of the girls, and told them—

Mr. RAY.—We object to any conversation between Ludin and the girls in Seattle * * * the notation shows the delivery by the Alaska Steamship Co. of the two tickets.

The COURT.—Yes, the message shows the tickets were delivered, so the fact that the girls got notice is not important.

Q. Did you deliver any tickets? A. I did.

Q. In compliance with this request?

A. Yes, sir.

Q. Whom to?

A. To Mildred Hilkert and Margaret Hilkert.

Q. Have you those tickets? A. Yes, sir.

Q. Will you produce them?

A. Yes, sir. (Witness does so and hands to Mr. Duggan.)

Q. I will ask you this question, Mr. Ludin, when a ticket is issued what routine is gone through?

A. Why I have the passenger sign it and I countersign it.

Q. Do you recognize that signature? (Handing witness ticket.)

(Testimony of W. H. Ludin.)

A. I recognize my own.

Q. Do you recognize the other one?

A. Merely that the girls signed it—I know they signed it.

Q. In your presence? A. Yes, sir.

Q. Whom was that issued to?

A. This was issued to Mildred Hilkert. [25—12]

Q. And this one? (Handing witness the other ticket.) A. That one to Margaret Hilkert.

Q. Were they signed in your presence?

A. Yes, sir.

Mr. DUGGAN.—I offer in evidence the ticket issued to Mildred Hilkert and ask it be marked Government's Exhibit "G."

Mr. RAY.—The defendants object to the introduction of this exhibit for the reason that the indictment charges transportation from Seattle to Anchorage, Alaska, and the ticket is from Seattle to Knik Anchorage and it has not been shown that Knik Anchorage and Anchorage are one and the same; and the further objection that it is unnecessary to encumber this record with the statement of liability as set forth in this ticket when the telegram shows the delivery of the two tickets.

Objection overruled; defendants allowed an exception.

The ticket is admitted in evidence as Government's Exhibit "G," is attached hereto and made a part hereof.

Mr. DUGGAN.—We also offer the ticket issued to Margaret Hilkert.

(Testimony of W. H. Ludin.)

Same objection; same ruling and exception.

The ticket is marked Government's Exhibit "H" and admitted in evidence; is attached hereto and made a part hereof.

Q. Do you know whether or not these girls took passage on the "Alameda"? A. I do.

Q. How do you know?

A. I saw them on the boat.

Q. What was the sailing time of the "Alameda," do you remember?

A. 9 A. M. on August 10th, I believe it was.

Mr. RAY.—Who identified these people to you, Mr. Ludin? A. They identified themselves.

Witness excused. [26—13]

Testimony of William A. Spoon, for the Government.

WILLIAM A. SPOON, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. State your name. A. William A. Spoon.

Q. Where do you live?

A. Seattle, Washington.

Q. What, if any, official position do you hold in Seattle? A. Assistant cashier of the cable office.

Q. As such assistant cashier of the cable office are you custodian of the messages received and delivered?

A. I am custodian of the files.

(Testimony of William A. Spoon.)

Q. On or about the first day of August, 1921, was there a message received in your office from Anchorage, Alaska, addressed to Mildred Hilkert, Normandie Apartments, Seattle, Washington, signed by Ragtime Kelly?

A. There was one received August second,—filed at Anchorage, August first.

Q. Have you that message?

A. I have. (Witness produces paper and hands to counsel.)

Q. What is this?

A. That is a water copy of the original message delivered to Mildred Hilkert.

Mr. RAY.—Did you deliver that message?

The WITNESS.—I phoned that to Mildred Hilkert and then she called for it at six o'clock and I delivered it to her personally; it was phoned at 5:15, I believe, P. M.

Mr. DUGGAN.—We now offer this message in evidence.

It is admitted, without objection, and marked Government's Exhibit "I"; is identical with Government's Exhibit "A," which appears on page 3 of this record. [27—14]

Q. Did either Mildred Hilkert or Margaret Hilkert the next day or soon thereafter deliver at your office a message addressed to Ragtime Kelly?

A. Mildred Hilkert filed one at 6:05 the same date to Ragtime Kelly. (Producing paper and handing to counsel.)

Q. That was on the second, was it?

(Testimony of William A. Spoon.)

A. Yes, sir.

Q. She filed that personally? A. Yes, sir.

Mr. DUGGAN.—We offer this message in evidence.

It is admitted, without objection, marked Government's Exhibit "J"; is identical with Government's Exhibit "B," which appears on page 5 of this record.

Q. Thereafter, on or about the third day of August, 1921, was there received at your office a message from Ragtime Kelly, Anchorage, Alaska, addressed to Margaret Hilkert or Mildred Hilkert, Normandie Apartments, Seattle, Washington?

A. I have one received August 3d to Mildred Hilkert, Normandie Apartments, signed Ragtime Kelly. (Producing paper and handing to counsel.)

Q. What is this?

A. A water copy of the original.

Q. What was done with the original?

A. The original was delivered to the Normandie Apartments and signed by Miss Mosson.

Mr. DUGGAN.—We offer this copy in evidence. It is admitted, without objection, marked *Gover it* "K"; and reads as follows:

(Testimony of William A. Spoon.)

Government's Exhibit "K."

Anchorage, Alaska, Aug. 3.

Mildred Hilkert,
Normandie Apartments,
Seattle, Wash.

I am wiring two tickets for *ex* Alameda.

RAGTIME. [28—15]

Q. About the third of August, 1921, did your office receive a message from P. B. Coe, Anchorage, Alaska, addressed to G. F. Henrioud, Alaska Steamship Co., Seattle, Wash.?

A. There was one received on the 4th from Anchorage. (Handing counsel paper.)

Q. What is this?

A. This is a water copy of the original.

Q. What was done with the original?

A. The original was delivered and signed for by W. H. Ludin.

Q. Is that the Ludin who is a witness in this case? A. Yes, sir.

Q. One of the agents in the Seattle office?

A. Yes, sir.

Mr. DUGGAN.—I offer this message in evidence.

It is admitted, without objection, marked Government's Exhibit "L" and is identical with Government's Exhibit "E," which appears on page 8 of this record.

Q. What have you there?

A. I have the delivery sheet of other messages

(Testimony of William A. Spoon.)

that originated in Anchorage and were delivered in Seattle, the receipts for the delivery.

Q. Will you indicate where those receipts are?

A. There is the first one, to Mildred Hilkert from Ragtime Kelly (indicating); there's the second one, from Ragtime Kelly to Mildred Hilkert (indicating), signed for by Miss Mosson, and there's the Henrioud message (indicating).

The three receipt sheets are admitted in evidence, without objection, marked Exhibit "M"; are attached hereto and made a part hereof.

(By Mr. RAY.)

Q. When did you leave Seattle?

A. First day of February, 1922.

Q. And came directly to Anchorage?

A. Yes, sir. [29—16]

Testimony of Mildred Hilkert Bowles, for the Government.

MILDRED HILKERT BOWLES, a witness called and sworn as a witness in behalf of the Government, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. What is your name?

A. Mildred Hilkert Bowles.

Q. On or about during the month of August last what was your name? A. Mildred Hilkert.

Q. You have since been married?

A. Yes, sir

(Testimony of Mildred Hilkert Bowles.)

Q. On or about the first day of August did you receive a telegram from Anchorage? A. I did.

Q. Whom was it from in Anchorage?

A. From Ragtime Kelly.

Q. How did you receive that message?

A. From the United States military cable office.

Q. Where?

A. At the Normandie Apartments, Seattle.

Q. Is that the message? (Handing witness paper.) A. Yes, sir.

Mr. DUGGAN.—We now offer in evidence this message which is an identical copy of Exhibit "A" already in evidence.

The message is admitted as Government's Exhibit "N"; it is identical with Government's Exhibit "A," found on page 3 of this record.

Q. After receiving that message what did you do?

A. I replied to it with a wire stating the terms we would come on.

Q. Did you write the message yourself?

A. I did.

Q. Is that the message? (Hands witness paper.) [30—17] A. Yes.

Q. Is that your handwriting? A. Yes.

Q. Is that your signature? A. Yes, sir.

Q. What did you do with the message?

A. Delivered it at the cable office.

Q. Thereafter, on or about the third day of August, did you receive any further message from Ragtime Kelly at Anchorage?

(Testimony of Mildred Hilkert Bowles.)

A. I received a wire that he would wire tickets through the cable office for us to come on the "Alameda."

Q. Is that the wire? (Handing witness paper.)

A. Yes.

Mr. DUGGAN.—We offer this message in evidence.

It is admitted as Government's Exhibit "O," without objection, and is identical with Government's Exhibit "K," found on page 15 of this record.

Q. Upon receipt of this message what did you do?

A. Packed up our trunks and got ready to catch the boat. We called the steamship office first, called up to see if the tickets had arrived and they said they would look it up and we went out and while we were away, the steamship office called up our home and said the tickets had arrived and we went over and got them.

Q. And then what did you do?

A. Packed up and caught the "Alameda."

Q. Where did you board the "Alameda"?

A. At Seattle.

Q. Where did you come to? A. To Anchorage.

Q. This city? [31—18] A. Yes, sir.

Q. Where did you land?

A. At Anchorage, the dock.

Q. And then where did you go?

A. To the depot.

(Testimony of Mildred Hilkert Bowles.)

Q. Whom did you meet there?

A. Kelly with a car.

Q. This defendant? A. Yes.

Q. Where did you go then?

A. In the car, to his place of business.

Q. What place is that?

A. The pool-hall know as Ragtime Kelly's.

Q. What, if anything, happened when you went there?

A. Well, we got out of the car and we were a little bit surprised at the place—

Mr. RAY.—We object to that. (Objection sustained.)

Q. Tell what happened.

A. We got out of the car and went into the place and met Mrs. Kelly and then we were taken through the pool-room and through a side room upstairs to an apartment that we were informed was prepared for us.

Q. What, if anything, was said about the apartment?

A. Mrs. Kelly said in speaking of a place for us to stay, she said she had prepared a room for us and had it fixed up and she had done quite a lot of work fixing it up for us.

Q. Who was it that said that? A. Mrs. Kelly.

Q. This defendant? A. Yes.

Q. Where was it, this apartment? [32—19]

A. Upstairs over the front of the pool-hall.

Q. Describe what you saw when you went into the pool-hall?

(Testimony of Mildred Hilkert Bowles.)

A. Just an ordinary pool-hall, with an ordinary pool-table. Near the door was a counter and a short bar and two pool-tables at the back. There was a card-table at one side and at the front end was a side room we always had to go through in going upstairs.

Q. What, if anything, was said by either of these defendants to you regarding your work?

A. Why, we asked what we were to do and were told we were to play and sing, play the piano and sing and entertain, and we were asked that evening to sing a song or two and requested to be excused on the plea of a long journey and being fatigued and we went upstairs then to refresh ourselves, and Mrs. Kelly and Mr. —— and ourselves went to dinner to the Frisco; then we tried to excuse ourselves from going downstairs but Mr. and Mrs. Kelly said, "Come down awhile," they wanted to introduce us to some of the boys and we just waited around and just met people that evening, and then we went upstairs about eleven o'clock; and the next day was supposed to be the opening—we were told the next night would be a grand opening.

Q. What, if anything, was said about clothes?

A. Mrs. Kelly asked us what we had in the way of wearing apparel and we told her we had some organdie dresses but she didn't seem to be enthused about them and said it wouldn't do, we had to have something more striking, and she told us to go and see what we could find in the way of evening

(Testimony of Mildred Hilkert Bowles.)

dresses, and we went out to the different stores and came back and said we didn't find anything and she said she would go with us and she did, and we went to the different stores and found an evening [33—20] dress at Miss O'Bryan's which Mrs. Kelly at that time paid for, and we went to Mrs. Ashton's and Mrs. Dougherty's looking for something and the dresses that were shown to us were very extreme and Miss O'Bryan showed us some dresses that she said were especially for the girls,—they were dresses that were made for the girls working on the line and we told her it wouldn't do at all. Then we looked and found this dress at Miss O'Bryan's that was all right and suitable—it was very low neck but it would do for me; and Peggy found a dress at Mrs. Dougherty's that passed approval and it was shortened and bought.

Q. What, if anything, did the defendant Kelly say about the dresses?

A. He didn't see the dresses until we were dressed that evening and I asked him how he liked them and he said he guessed they were all right, and I said I thought we were undressed and he said, "the less you have on the better." The other dress was low neck and short sleeves and he said it wasn't short enough.

Q. What did he remark about the other dress?

A. Well, he said it wasn't appropriate, it wasn't what he wanted but he guessed it would do.

Q. Who do you mean when you say Peggy?

(Testimony of Mildred Hilkert Bowles.)

A. I mean Margaret.

Q. Who is she? A. My sister.

Q. What is her name?

A. Margaret Johnson.

Q. In this wire she is described as Margaret Hilkert? A. Yes.

Q. How did that happen?

A. Her name is now Johnson. [34—21]

Q. How was it described as Hilkert then?

A. She was married on the fifth of last month.

Q. Now, on the first evening you were in Kelly's tell us what happened?

A. The first evening we arrived there?

Q. The first evening you entertained.

A. We were told we were to go on shift at 6 o'clock for the opening night. We came on at 6 and were to play the piano and sing, and we sang and entertained a few moments and meanwhile we were introduced to different men that appeared as the new girls, and they were asked their opinion as to our appearance and what they thought of the new girls.

Q. By whom?

A. By Mr. and Mrs. Kelly, both of them.

Q. What were your duties there?

A. We were told the first night we were to sing and entertain and we were also told we were to help whenever we were needed to serve drinks to anybody that cared to ask for them.

Q. Did you serve drinks? A. We did.

Q. What kind? A. I served beer and—

(Testimony of Mildred Hilkert Bowles.)

Mr. RAY.—We object and move to strike the answer.

Mr. DUGGAN.—The question goes to the atmosphere and condition of the place.

After argument the objection was sustained and motion to strike granted.

Recess to 1:30.

AFTERNOON SESSION.

Continuation of the Direct Examination of MILDRED HILKERT BOWLES by Mr. DUGGAN.

[35—22]

Q. What, if anything, was said to you by the defendants or either of them regarding what your duties were?

A. We were told by Mr. Kelly that we were to sing and play the piano and to drink with the men and to sell them liquor, because the more we drank with them the more they bought and the more money it was for the house.

Mr. RAY.—We move to strike that.

Motion denied; defendants allowed an exception.

Q. How long were you there?

A. Two weeks and just about two days.

Q. Can you at this time fix the day you got there?

A. You mean the day we arrived?

Q. Yes.

A. The evening of the 20th of August.

Q. And you say you were there two weeks and two days?

A. We quit there on the 5th of September, Labor Day, the night of Labor Day.

(Testimony of Mildred Hilkert Bowles.)

Q. Did you about the first or second day you were there take a trip to the Lake?

A. We arrived on Thursday; Friday we worked and Saturday night we went out to Lake Spenard.

Q. Who if anyone was with you?

A. Mr. Kelly, Mrs. Kelly, Mr. Sidney Anderson and Mr. Evans, the driver of the car.

Q. Was the other girl with you? A. Yes, sir.

Q. What was done on that trip?

Mr. RAY.—We object to that.

Objection overruled; defendants allowed an exception.

A. On the trip? Why, we merely went out in the car, drove out and they had liquor along and we drank that,—it was passed [36—23] around quite frequently. On arriving at the lake Mr. Evans, Mr. Anderson, Margaret and myself went in swimming. We were there a short time and got in the car and came back to town.

Mr. RAY.—We move the testimony be stricken, not pertaining to any of the issues charged in the indictment.

The COURT.—The answer will be stricken. Confine your questions solely to what was done when the two defendants or either one of them was present and what was done by their connivance and instigation.

Q. What, if anything, did the Kellys or either one of them say regarding going out to the Lake?

Mr. RAY.—We object to that as leading. (Sustained.)

(Testimony of Mildred Hilkert Bowles.)

Q. Who invited you to go out there to the Lake?

Mr. RAY.—We object to that.

Objection overruled; defendants allowed an exception.

A. It was Mr. Anderson suggested it to those in the box at the Frisco where Mr. and Mrs. Kelly, myself, Mr. Anderson, Mr. Evans and Margaret were having supper, after two o'clock,—after the pool-room was closed, and it was very agreeable to everybody.

Q. Who had the liquor?

A. That I don't know for a positive fact, whether Mr. Anderson or Mr. Evans had it, but it was brought in. They made arrangements and it was brought there to the box.

Mr. RAY.—We move that be stricken as not responsive to the question.

Motion denied; defendants allowed an exception.

Q. What, if anything, took place after returning from the Lake?

A. Well, we got into the car at the Lake and drove home; it was early in the morning and we drove to the back entrance of the pool-hall and went up the back stairs and we all stopped in Mrs. Kelly's apartment. [37—24]

Q. Who was present?

A. Mr. and Mrs. Kelly, Mr. Sidney Anderson, Mr. Evans, Margaret and I.

Q. What happened?

A. Mr. Anderson at that time was very intoxicated and was put to bed.

(Testimony of Mildred Hilkert Bowles.)

The COURT.—Confine your testimony to what was said and done by the defendants and in their presence.

The WITNESS.—They were all together.

The COURT.—You are not to testify unless it took place in the presence of Mr. and Mrs. Kelly or one of them.

The WITNESS.—They were there, Mr. and Mrs. Kelly, and Mrs. Kelly requested him to get off of her bed and stretch out on the davenport in their room and I made my excuses, that I was tired and asked to be excused and started for our apartment, thinking that Peggy was following me and it was dark; when I got up to the apartment Mr. Evans had followed me and I said "Where is Peggy?" and he didn't know and I said "Well, let us go back and get her," and he asked me to talk a few minutes and finally put up the proposition that I was to go to bed with him and I refused.

Mr. RAY.—Who was this talk with?

A. This was with Mr. Evans.

Mr. RAY.—We ask that it be stricken.

The COURT.—It will be stricken unless connected with the defendants.

Q. Did you afterwards have any conversation with either of the defendants regarding that?

A. I went back to the room and asked Peggy why she hadn't followed me and she said that Mrs. Kelly had stopped her.

The COURT.—Don't tell what anybody said unless Mr. and Mrs. [38—25] Kelly were present.

(Testimony of Mildred Hilkert Bowles.)

The WITNESS.—They were present at this time, they were all there together, in their apartments, and she asked me where I had been. I asked her, why didn't she follow me, and she asked why I didn't come because she sent Mr. Kelly after me and Mr. Kelly never appeared in my apartment whatever,—Mr. Evans had followed me. Then I went to my apartment and went to bed.

Q. Afterwards did anyone come up to your room?

A. Yes. The following Monday I was introduced to a Greek or a Russian they called John.

Q. By whom? A. By Mr. Kelly.

Q. What did he say when he introduced you?

A. He told me this was John, he was a nice man and wanted me to be nice to him. John was a foreigner and couldn't speak very nicely and Kelly told me to invite him—"Invite John up to your room; you know how to entertain him; he is good for a lot of money, he has all kinds of money"; and John spoke about a dinner and I agreed to it and I told him he could come up to the apartment for dinner at two o'clock the next afternoon, and then Mr. Kelly told me he would put up a hard luck story; he said, "You girls are hard up and I will put up a hard luck story to the Greek."

Q. Who was present?

A. Kelly, I and my sister.

Q. Anyone else?

A. Not directly, right there—it was in the pool-hall. And about eight o'clock the next morning

(Testimony of Mildred Hilkert Bowles.)

somebody knocked at the door; it was this John, —after the pool-hall had opened; and I asked him what he wanted and he said he came to see about the dinner and I told him it was too early. [39—26]

Mr. RAY.—Were the Kellys there?

A. Not at that time, no; and I asked him how he got up there and he said Kelly was downstairs and let him come up. There was no possible way for him to get up without passing through the pool-room.

Mr. RAY.—We object to that.

The COURT.—John's statement is hearsay—it may be stricken.

Q. What, if anything, was said between you and this John in the room?

Mr. RAY.—We object to that—we will reserve our objection.

A. He came up to the room for dinner and we had a nice little dinner and then while I was ironing he came out point blank in the presence of my sister and asked me to go to bed with him and I refused.

Q. Was anything said about money?

A. Yes, he started in at ten dollars; he said I was hard up. Kelly told him we were hard up.

Mr. RAY.—We object to all the testimony given by this witness since the last objection was reserved, and move it be stricken.

The COURT.—The motion will be denied—I don't think the witness should go any further now without connecting up what she has stated.

(Testimony of Mildred Hilkert Bowles.)

Q. How much did he offer?

A. He offered me finally one hundred dollars.

Q. Did you speak to Kelly afterwards about it?

A. Yes, I told him about the Greek offering me a hundred dollars and he said, "What, do you want to tell me a man offered you a hundred dollars?" and he said, "Did you take it?" and I said "No," and he said, "You are a damned fool," and he said if we kept on the way we were going we would blow into the poorhouse; he said we girls had more good offers up here—

Mr. RAY.—We object on the ground that the offer to connect the [40—27] testimony in a legal and lawful manner has not been met.

Objection overruled and defendants allowed exception.

Q. What, if anything, did Kelly say about this man?

A. Well, at different times John came in, frequently, nearly every night in fact, and Kelly insisted I be nice to him because of what he was going to do, he was going to advance him some money in a business way,—he was trying to raise some money on an oil claim and he told me to be nice to him, the Greek would fall for it, and I asked him what it was to me whether he or anybody else made any money in that way, and he said, "You can feather your own nest at the same time you help me,"—he said, "You play it right and you can feather your own nest."

Q. Were you asked by either of the defendants here to play cards in Kelly's pool-room?

(Testimony of Mildred Hilkert Bowles.)

A. Yes.

Q. More than once? A. Several times.

Q. What was said by either one of the defendants?

Mr. RAY.—We object to that.

Objection overruled; defendants allowed an exception.

A. Kelly would say, "Here, girls, I will give you $5.00; stake you in the game."

Mr. RAY.—We object to that.

Objection overruled; defendants allowed an exception.

Q. Who was playing in those games besides you?

A. I played at times, my sister played other times and sometimes both of us played in the same game, with the dealer of the cards and anybody else that cared to sit in the game.

Q. What was the condition of the players?

A. Some of them were intoxicated and some were not. [41—28]

Q. What kind of language was used?

A. Profanity to a great extent—if the game was getting along very nicely there was very little said,—they played cards.

Q. What, if anything, did Mrs. Kelly say to you about meeting other girls?

Mr. RAY.—We object to that.

The COURT.—You can show the associations the defendants brought this girl into.

Mr. RAY.—I object to the question for the reason that the defendants here are upon trial upon the charge of transporting in interstate commerce

(Testimony of Mildred Hilkert Bowles.)

two girls—there is no charge of their having anything to do with any other young ladies and the testimony sought to be elicited by the question propounded to the witness can in no way tend to prove the charge in the indictment.

The COURT.—This seems to be laying the foundation for another question. The objection will be overruled.

Defendants allowed an exception to the ruling.

Q. Did you meet any other women there?

A. Yes, sir.

Q. Who were they?

Mr. RAY.—We object to that.

Objection overruled; defendants except.

A. Girls from the line.

Q. What do you mean by that?

A. The sporting element, houses of prostitution.

Q. What, if anything, did either of the defendants say at that time?

A. Mrs. Kelly came to the side door and hollered clear across the pool-hall—"Girls, come here, I want you to meet some of the girls from the line." [42—29]

Q. What, if anything further, was said by Mrs. Kelly at this time?

Mr. RAY.—We object to the question propounded by the District Attorney to the witness on the ground that it seeks to prejudice the jury and inflame their minds against the defendants and can in no manner tend to prove whether or not on the third day of August, 1921, the defendant

(Testimony of Mildred Hilkert Bowles.)

Kelly wired to the witness on the stand with the intent and purpose to induce her to live the life of a prostitute or to live a life of debauchery or to indulge in other criminal practices, as charged in the indictment.

Objection overruled; defendants allowed an exception.

Q. At this time did she say anything further to these girls or say anything further than you have already stated when she called you over acrossed the hall?

A. Not just at that moment.

Q. What, if anything did she say?

The COURT.—About the same subject.

A. I walked acrossed the pool-hall to the side room—these girls were in the back room, and Mrs. Kelly was standing at the door and I asked her what was the idea, that I wasn't accustomed to associating with these people, and she said, "These girls are all right, they are good fellows, good spenders, come in and meet them," and me and my sister walked in and were introduced to the girls and they bought several drinks and there were two or three men with them.

Mr. RAY.—We move to strike the answer.

Motion denied; defendants except.

Q. Did Mr. Kelly come in there? A. Yes, sir.

Q. What, if anything, did he say?

A. He said the girls were good fellows. [43—30]

Q. Did Mr. Kelly say anything further about getting acquainted with the girls at this time?

(Testimony of Mildred Hilkert Bowles.)

Mr. RAY.—We object to the question.

Objection overruled; defendants allowed an exception.

A. Not that night.

Q. Did he at any other time? A. Yes, sir.

Q. Who was present?

A. Mr. Kelly and several girls from the line and their escorts.

Q. Were you there? A. I was.

Q. Was Mrs. Kelly present?

A. She was in and out.

Q. What was said?

A. The girls asked us to go out with them.

Mr. RAY.—We object to the question and move to strike the answer on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Nothing will be admissible unless Mr. or Mrs. Kelly was present and we will exclude any statements by this witness unless made and done in the presence of Mr. and Mrs. Kelly, or either of them.

Q. What, if anything, did Mr. Kelly say at this time, the second time?

A. Why, we were invited by the girls to go with them and the party and we refused and Mr. Kelly said, "Why not?" and was speaking about he and his wife, the fun they had, and said, "Go down and see the nice place the girls have, look it over and see how they do business."

Mr. RAY.—This is all subject to our objection and exception.

(Testimony of Mildred Hilkert Bowles.)

The COURT.—Very well. [44—31]

Q. Do you remember any other time when you had a conversation about going down the line?

A. Yes.

Q. About what time was that?

A. It was in the evening—it is impossible for me to recall just exactly the times. We were on shift from six o'clock in the evening until two in the morning.

Mr. RAY.—We ask to strike that.

The COURT.—The motion will be denied and exception allowed; specify the time as near as you can.

A. It was in the first week of our arrival.

The COURT.—And state the time of day and where it took place and if any persons were present.

Q. Do you remember the time of day?

A. It was in the evening, I judge about nine or ten o'clock.

Q. Where was it—where did it take place?

A. In the back room, a side room of the Kelly pool-hall.

Q. Who was present?

A. Mr. Kelly and Mrs. Kelly at times and my sister and girls from the line and their escorts.

Q. What, if anything, was said by Mr. and Mrs. Kelly, or either of them?

Mr. RAY.—We object to the question.

Objection overruled; defendants except.

A. The girls from the line came in and treated us as—

Mr. RAY.—We object as not responsive.

(Testimony of Mildred Hilkert Bowles.)

The COURT.—The answer may be stricken.

Mr. DUGGAN.—It will be necessary in this instance to state something that the girls stated in the presence of these defendants.

The COURT.—Anything stated in the presence of Mr. or Mrs. Kelly is admissible. [45—32]

Q. What, if anything, was said by the girls in the presence of Mr. and Mrs. Kelly?

Mr. RAY.—Same objection.

Objection overruled; defendants except.

A. One of the girls asked us to have a drink and I drank a glass of beer with them and Peggy took a glass of grape juice but refused to drink and she asked me if we smoked—

Q. Who said that?

A. One of the girls—the party was in the back of the hall—and she said, "What is the matter—don't you do anything?" and Peggy said, "No, I don't," and she said, "What is the idea? You are nothing but a chippy working for Kelly."

Q. Who was present?

A. Kelly himself.

Q. What did he say?

A. At that time he said nothing but walked out, and served the drinks. When the girls left—

Q. What did Kelly say afterwards?

A. He said, "Why had the girls left? They should have stayed longer, they were good for three or four more drinks and we made them sore and were driving business away from the hall."

Mr. RAY.—We object to that and move to strike.

(Testimony of Mildred Hilkert Bowles.)

Objection overruled and motion denied; defendants except.

Q. Calling your attention to about four or five days after you arrived—you say you came on the 20th? A. Yes, the 20th.

Q. Somewhere about the 24th or 25th, did you have some altercation with some foreigners in this room in the presence of Mr. Kelly?

Objected to; sustained.

Q. Have you seen that gown before? (Showing dress to witness.) [46—33]

A. Yes.

Q. What is it?

A. It is an evening gown that I wore at Kelly's. It is the dress I bought and wore the first night, the opening, at Kelly's.

Q. About four or five days after you arrived did you meet some Greeks in the back room in Kelly's?

A. Yes, sir.

Q. Who was present?

A. There were five or six Greeks in there and Mr. Kelly in and out serving drinks. We were called in to help entertain and drink with the men.

Q. Who called you in? A. Kelly.

Q. What did he say?

A. He told us to go in—first he called us in and introduced us—"Here are the new girls, boys." They were men I understood from the Eska mine and strangers in the town. He introduced us as new stuff.

Q. Did you go in? A. Yes, sir.

Q. What, if anything, happened there?

(Testimony of Mildred Hilkert Bowles.)

A. At that time the men took familiarities, putting their arms around us and pawing and feeling of our persons and pinching every part of us. When Kelly walked out I served a few drinks to them for a time and I asked him not to send us in there any more—they were rough and intoxicated, one very much so.

Q. What did Kelly say?

A. They were a fine bunch, they were good spenders, they were in from the mine and had all kinds of money and it was a long time since they saw any girls like us and not to be a fool, [47—34] they wouldn't hurt us and to go ahead.

Q. At this time were your clothes torn?

Mr. RAY.—We object to that.

Whereupon the jury was excused and argument had on the objection. (Jury returns.)

The COURT.—The objection will be overruled and exception allowed, with the understanding that this is a preliminary question, to lay the foundation for something more definite. A. Yes.

Q. Where was it?

A. In the back room, in the pool-hall.

Q. What pool-hall? A. Ragtime Kelly's.

Q. What was the condition of these people that were there as to sobriety?

Mr. RAY.—We object to that.

Objection overruled; exception allowed.

A. They were intoxicated.

Q. Is that the gown you have there? A. Yes.

Q. Is that the one you wore at that time?

A. Yes, sir.

(Testimony of Mildred Hilkert Bowles.)

Q. What, if anything, happened to it?

A. It was torn here at both shoulders.

Q. Who tore it?

A. One of the men in this back room.

Mr. RAY.—Did Kelly tear it? A. No, sir.

Mr. RAY.—We object to it.

The COURT.—It is preliminary—it will be necessary to connect one of the defendants with it or it will be stricken. [48—35]

The WITNESS.—I positively requested Kelly several times that evening not to send us to this room and we were told that it was one of our duties and for us to drink and it was necessary for us to go there.

Q. Who said this? A. Kelly.

Mr. RAY.—We object to it.

(By the COURT.)

Q. How long did this happen after you arrived here? A. Toward the end of the week.

Q. What day of the week was it?

A. Saturday and Sunday was the main days.

Q. The 20th of August was Saturday?

A. Yes.

(By Mr. DUGGAN.)

Q. And this would be the latter part of the following week? A. Saturday or Sunday.

Q. How many days after you arrived here?

A. I guess six or seven.

Q. What, if anything, did Kelly say at this time to the men who were present, when your dress was torn?

(Testimony of Mildred Hilkert Bowles.)

Mr. RAY.—We object on the ground that any statement relative to what happened to the young lady's dress by the defendant Kelly can in no way bind the defendant Mrs. Kelly.

The COURT.—The jury will be instructed that neither defendant is bound by the statement of the other, unless in the presence of the other, * * * the object is to show his attitude toward the transaction which took place a few moments before.

Q. Was Kelly present?

A. Not right at that moment—he came in serving drinks.

Q. When? [49—36]

A. Directly after and before.

Q. What did he say, if anything, to the men that were present at the time the dress was torn?

A. He told them to treat us easy, to go easy with us, and handle themselves carefully—they are not used to rough treatment.

Q. At that time that you have just mentioned did Kelly say anything about what your duties were?

Mr. RAY.—We object as repetition.

Objection overruled; defendants except.

A. Why, when I was angry at the treatment and the mauling we had received—

Mr. RAY.—We object to that.

Q. Say what he said?

A. Kelly told us it was our duty to drink with the men, that that was what we were here for—that I was a regular touch-me-not. He told me at that time if we kept on the way we were acting,

(Testimony of Mildred Hilkert Bowles.)

we would end up at the poorhouse,—a repetition of something that was said before.

Q. How long did you say you were in this place?

A. We arrived on the 20th of August and left there on the 5th of September.

Q. Other than those you have mentioned did any other person come to your room?

A. At several different times men came up there, —came in the morning before we were up and knocked. This Greek was up several times, repeatedly, in fact nearly every day, all the time we were there.

Q. Did you receive a phone call while there from anyone?

Mr. RAY.—We object to that on the ground that she might have received a hundred phone calls and Kelly know nothing about it.

The COURT.—It is preliminary. Objection overruled; defendants allowed an exception. [50—37]

A. Yes, sir.

Q. Can you fix the time?

A. It was late in the evening.

Q. About what day?

A. The Sunday night before Labor Day.

Mr. COFFEY.—We object as too remote.

Objection overruled; defendants except.

Q. Did you answer this phone call?

A. I did, after a delay of about fifteen or twenty minutes.

Q. Who called you to the phone.

A. Why, a stranger. I was in the dance-hall, —they were having a dance and a strange man came

(Testimony of Mildred Hilkert Bowles.)
and told me I was wanted at the phone—I didn't believe him, and Margaret called me. I answered the telephone, the receiver was down, and it was waiting on the counter in the phone room.

Q. Was anyone near at the time, any of the defendants?

A. Both of them; Mrs. Kelly was standing at that time toward the end of the pool-tables and Mr. Kelly at the end of the counter—he was at one end and the phone at the other end.

Q. What was the nature of the conversation on the phone?

Mr. RAY.—We object to that, any conversation between this girl and some man—whether he is here or not, we don't know.

The COURT.—The objection will be sustained, but she may testify whether she made a report of the phone conversation to the Kellys.

Q. Who received the call on the phone before you came? A. Mr. Kelly.

Q. What, if anything, did you say to the Kellys or either one of them regarding this phone call?

A. In my conversation I was asked to go to the Frisco and I said, "No, I am working," and Mrs. Kelly said, "It is all right, it is all right." [51—38]

Q. Was that overheard by Mrs. Kelly?

A. Yes, sir. I said I was not through working until two o'clock and it would be impossible to leave without their permission and she said, "It's all right, it's all right," and I was told to meet this party outside the door. He said, "It's all

(Testimony of Mildred Hilkert Bowles.)

arranged to meet me outside," and Mrs. Kelly said, "It's all right, it's all right," and as I started out she said, "You want to work fast before this party cools off."

Q. What, if anything, happened afterwards?

A. I met the man and I understood we were going to the Frisco and instead of that he said, "No, we are not going to the Frisco at all—"

Mr. RAY.—We object to this.

The COURT.—Was this conversation between you and the man outside?

The WITNESS.—This was the man that telephoned.

Objection sustained.

Q. Who told you you were going to the Frisco?

A. I heard it over the phone and Mrs. Kelly agreed there was a party on.

Q. To go where? A. To the Frisco for supper.

Q. What happened after you got outside?

Mr. RAY.—We object to that, conversation between outsiders, not in the presence of Mr. or Mrs. Kelly.

Mr. DUGGAN.—I will withdraw the question.

Q. Where did this party take you?

Mr. RAY.—We object to the question.

Objection sustained.

Mr. RAY.—We move that the last three answers be stricken.

Motion denied; defendants except. [52—39]

Q. What, if anything, did you say to Mr. Kelly when you came back from this trip?

Mr. RAY.—We object to that.

(Testimony of Mildred Hilkert Bowles.)

Objection overruled; defendants allowed an exception.

A. I walked in and Kelly said, "What are you doing back here?" and I said, "Where should I be if not here?" and he said, "Did you get anything?"

Q. What did you say?

A. I said, "No," and I walked up through the pool-room and asked where my sister was and he said he didn't know.

Q. What further did Kelly say?

A. Why, in regard to that, right then, nothing.

Q. Did Kelly ever speak to you about a hunting trip?

Mr. RAY.—We object to that—it must be shown when it occurred.

Q. When was this?

A. The conversation about the hunting trip?

Q. Yes.

A. In the early part of the second week we were there, Monday or Tuesday, because there had been plans—

Mr. RAY.—We renew our objection on the statement of the witness that it was two or three weeks after her arrival here.

The jury being excused, after argument by counsel—

By Mr. DUGGAN.—The Government at this time offers to prove by the witness Mildred Hilkert Bowles that about ten days after arriving at Kelly's pool-hall the defendant Kelly stated to the witness Mildred Hilkert Bowles and in the presence of her

(Testimony of Mildred Hilkert Bowles.)

sister Margaret Hilkert Johnson that his wife was going away on a hunting trip, that he, another man and Margaret and Mildred would have a good time while she was gone; that Mildred asked the defendant Kelly what he meant by a good time and he stated in [53—40] reply thereto, a bedroom party with all the trimmings, or evidence to that effect.

The COURT.—I think you can do that.

Defendants allowed an exception.

(Jury returns.)

Q. Did you have a conversation with Frank Kelly regarding Mrs. Kelly going on a hunting trip? A. Yes, sir.

Q. What was said?

Mr. RAY.—We object to the evidence sought to be elicited by the question propounded in view of the offer made in the absence of the jury—First, it in no way binds the defendant Mrs. Grace Kelly and is being introdued in a case where Grace Kelly is codefendant with Frank Kelly; second, said testimony cannot in any manner tend to prove whether or not on August 3, 1921, the defendant Frank Kelly or the defendant Grace Kelly furnished transportation by telegraph transfer to the witness Mildred Hilkert Bowles for the purpose of inducing or enticing her to come to Alaska to live a life of prostitution and debauchery; third, that it is an attempt to inflame and prejudice the minds of the jury and befog them as to the real issue in the case.

(Testimony of Mildred Hilkert Bowles.)

The COURT.—It can only go to the question of intent and could not under any circumstances be used as evidence against Mrs. Kelly—she neither made the statement nor was she present when it was made—and the jury will be so instructed. The objection will be overruled. Defendants allowed an exception.

A. He informed me that as soon as the holidays were over Mrs. Kelly was going to take a vacation and going on a hunting trip and while she was away that Mr. Kelly and I and another gentleman [54—41] and Peggy would have a party and I asked him what he meant by a party, and he said, "We will have a regular party, we will have some good stuff, some bonded stuff, we won't drink mule," and I said, "If you mean a bedroom party, count me out," and he said, "Once wouldn't hurt you; you are only human."

Mr. RAY.—We ask that be stricken.

Motion denied; defendants except.

Q. Do you remember the time you left Kelly's? The date?

A. When I left the building or quit working?

Q. Quit working.

A. Ten o'clock, Labor Day night, around or about ten o'clock, on the 5th of September.

Q. Why did you leave?

A. Because Kelly and I had been quarreling and arguing more or less for two days and that night, all that day and all the evening men were intoxicated and we were subjected to all kinds of insults; and—

(Testimony of Mildred Hilkert Bowles.)

Mr. RAY.—We object to this character of testimony and move to strike the answer.

The COURT.—The motion to strike is denied. It will be covered by instructions.

Q. Finish your answer if you have anything more to say.

A. I got absolutely no protection from Mr. Kelly, who had been drinking heavily and I frequently asked him not to send us in there and he informed us we were working for him and that is what we were supposed to do.

Q. Is this a statement of Kelly to you?

A. Yes—I asked him to at least protect us; he was intoxicated and *and* he told me that we were there for that purpose, to entertain and by treating the men the way we were doing that night [55—42] we were driving them out of the house. driving the best customers out of the house, and at ten o'clock, after arguing back and forth, I quit and walked off.

Mr. DUGGAN.—That is all.

Cross-examination by Mr. MURPHY.

Q. You arrived here, did you not, about the 18th of August?

A. I think it was on the 20th.

Q. You testified that when you got here Mrs. Kelly examined your wardrobe and she said the clothes you had were not gaudy enough and she went out and purchased some gaudy clothes for you?

(Testimony of Mildred Hilkert Bowles.)

A. She told us to look at some evening gowns, and went with us while we purchased them.

Q. She purchased the evening gowns, and is it not a fact that when she purchased those evening gowns, she purchased a hat for you?

A. No—she paid outright for my dress.

Q. Didn't she purchase a hat for you?

A. No, sir. I got the hat, and opened an account in my own name at Mrs. Dougherty's, and a few days after she came there and took up the bills and then informed me of the fact that I owed her this money.

Q. Is it not a fact that Mrs. Kelly went to Mrs. Dougherty and arranged to have you people to get stuff there?

A. She merely vouched for our account, said we were working for her and would be able to pay.

Q. And do you think you would have gotten the credit at Mrs. Dougherty's if Mrs. Kelly did not vouch for those accounts?

A. No doubt, because we had no trouble in getting credit up in this country.

Q. And you think you could have gone to Mrs. Dougherty and got [56—43] credit?

A. On the say so that I was working there and making money there, yes.

Q. Who paid the account?

A. Mrs. Kelly paid it.

Q. Besides the dress you got, that also included underwear, corsets, and shoes and hats, did it not?

(Testimony of Mildred Hilkert Bowles.)

A. It included a pair of shoes to wear with the dress.

Q. Didn't she also pay for hats for you and your sister?

A. She paid them on her own volition, nobody else's.

Q. Didn't she pay for them? A. Yes, sir.

Q. And she bought a lot more stuff for you than gaudy dresses? A. That was all.

Q. Is this a sample of the gaudy dress she bought? (Showing dress.) A. That's it.

Q. And at the time she purchased that dress, you said in your examination that Miss O'Bryan showed you other clothes that girls down the line wore? A. Yes, she did.

Q. And did she advise you to get some clothes of that kind?

A. No sir, she did not. She said that wouldn't hardly do.

Q. This dress you got was not of much value then —did you ever wear it any place besides Kelly's?

A. I have never had it on except at Kelly's.

Q. What dress did you wear at Valdez when you sang before the pioneers?

A. A serge dress I had.

Q. You are as positive of that as every other statement you have made? A. Yes. [57—44]

Q. What is your name at the present time?

A. Mildred Bowles.

Q. How old are you?

A. 25, the 16th of January.

(Testimony of Mildred Hilkert Bowles.)

Q. What was your name when you arrived at Anchorage? A. Mildred Hilkert.

Q. What was your father's name?

A. That I refuse to answer—that has no bearing whatever on this case.

Q. Is Miss Peggy your sister?

A. That I refuse to answer.

Q. Do you know whether or not she is your sister? A. I refuse to answer.

Mr. MURPHY.—I think she ought to answer.

The WITNESS.—Pardon me, Judge, but he has objected clear through this testimony to every statement which is made and I object to going into my personal affairs.

The COURT.—I don't see how that is material.

Q. Were you married before you came to Alaska?

A. I had been; yes.

Q. What was your husband's name?

A. I refuse to answer that.

Q. Were you divorced from him? A. I was.

Q. Where at?

A. I refuse to answer that.

Q. How long have you been in the entertainment business.

A. I entertained about six months at one time when I was about 17 years old; other than that, very little.

Q. Were you in the entertainment business in Seattle before coming here? [58—45]

(Testimony of Mildred Hilkert Bowles.)

A. No.

Q. Did you ever work in the Butler?

A. I entertained two evenings at the Butler.

Q. Have you entertained at the Pig'n Whistle?

A. I never entertained there; I had full charge of that place, on the floor.

Q. You were not one of the entertainers?

A. No.

Q. When did you work there?

A. I worked there from along in May to the last part of September.

Q. Did your team-mate Peggy work there with you? A. She worked one evening.

Q. Did she work with you at the Butler?

A. Yes.

Q. When you first came to Anchorage, that first day, Mrs. Kelly took you up to her room and showed you the rooms? A. Yes, sir.

Q. And you had a conversation with her at that time? A. Yes.

Q. You had several conversations with her?

A. Yes.

Q. She never directed you at any time to become a prostitute, or asked you? A. Point blank, no.

Q. Or Mr. Kelly? A. No.

Q. And all these incidents you think are just by inference, from what she did? A. Yes.

Q. Now, on the occasion when you said you went out to the Lake, what time did you leave Anchorage? [59—46]

A. I would say on or about three o'clock.

(Testimony of Mildred Hilkert Bowles.)

Q. It was after the performance?

A. It was after we closed at the pool-hall.

Q. And you drove out to Spenard Lake?

A. Yes.

Q. You went in swimming, you said?

A. Yes.

Q. Were Mr. and Mrs. Kelly present when you went in swimming?

A. Yes, they were sitting in the car.

Q. You had several drinks going out?

A. Yes.

Q. And Sid got stewed? A. Yes.

Q. What was his condition when you left?

A. He was partially intoxicated at that time?

Q. How were you? A. I was sober.

Q. All the way through? A. Yes.

Q. What time did you get back to the pool-hall?

A. I am not positive as to the time but I would judge it was between 5:30 and 6 in the morning.

Q. It was dark? A. Just getting dawn.

Q. So it was pitch dark when you were out at the Lake?

A. It wasn't pitch dark—there was light enough to see; you could see. You understand the conditions in this country at that time—it wasn't pitch dark.

Q. It was dark when you started to go from the Kelly apartments to your apartment?

A. Yes, it was dark—the light outside wasn't enough to light the building. There was a tiny electric light hanging by the [60—47] piano.

(Testimony of Mildred Hilkert Bowles.)

Q. That was lighted?

A. It was always lighted. We turned that up to use for the bathroom.

Q. Who was operating the dances upstairs?

A. I don't know.

Q. Do you know whether or not Mr. Kelly had anything to do with it?

A. No, I think Mr. Kelly leased the dance-hall—I am not positive.

Q. You went up there on the evenings there were dances there—you went up to dance?

A. Once or twice, yes.

Q. On these occasions I will ask you whether men ever went to your apartments, at your solicitation?

A. There has been people come in there, that is, one night, but that was the night we quit—there was quite a party while we were getting ready to go out.

Q. Now I will ask you, on certain occasions when you were dancing, if you and your dancing partners didn't go in there? A. No.

Q. Never, at any time—you are positive of that?

A. Yes.

Q. Who was in the pool-hall on the evening that Mrs. Kelly asked you to come into the room and meet the girls from the line?

A. The pool-hall was very much crowded.

Q. Do you know anybody that was there?

A. Not by name—I didn't know anybody by name.

(Testimony of Mildred Hilkert Bowles.)

Q. If you met the girls in there, do you know their names?

A. One was called Little Peggy and the other was called—I don't remember.

Q. You don't remember that?

A. No. [61—48]

Q. Do you remember the names of the escorts?

A. No.

Q. And Kelly said the girls were good fellows?

A. Yes.

Q. You met them? A. Yes.

Q. Did you ever meet girls from the line before?

A. No.

Q. Now, there was an invitation that you had to go hopping, and the Judge intimated he didn't know the meaning of the term and I will confess I don't, so would you kindly inform us what this term hopping means? Do you know the meaning of the term?

A. I am not positive, no, not entirely, but what I gathered, it was going through there, going to their places of business, out with them to places of that kind.

Q. Had you ever heard the term before it was used there? A. I had heard it, yes.

Q. And the meaning you get from it, you would infer it was going down to visit the girls at their homes?

A. The meaning I got from it that night.

Q. Was that the meaning you got from it the first time you heard it? A. No.

(Testimony of Mildred Hilkert Bowles.)

Q. What was it—stepping along?

A. Yes, stepping along—just exactly.

Q. Now you say Mr. Kelly made a remark about the dress—is that very much shorter than the one you have on? A. About the same length.

Q. On the lower end? A. On the lower end. [62—49]

Q. On the upper end it is an evening dress.

A. Very extreme.

Q. Nobody would ever accuse you of wearing an immodest dress now? A. No.

Q. I will ask you, Mrs. Bowles, if you are acquainted with one Pat Van Klier? A. No.

Q. Did you ever meet a fellow here named Pat Van Curler?

A. That is different—yes, I know him.

Q. You knew him very well?

A. He was one of the boys in the American Legion and was wounded and in the hospital at Spokane when I was there.

Q. And you met him coming up here?

A. The next I saw him he was coming up on the boat.

Q. Did you meet him in Seattle when he was there? A. Yes.

Q. Did you write him a letter from Valdez?

A. Perhaps.

Q. I will ask you if that is your signature? (Showing letter.) A. Yes.

Q. You wrote that portion of the letter?

A. Yes.

(Testimony of Mildred Hilkert Bowles.)

Q. Did you see the other portion of it that Miss Peggy wrote? A. I didn't see it.

Q. You knew that she wrote it—that she was corresponding with Mr. Van Curler—I will ask you, who wrote the other portion of the letter—do you recognize that writing? A. I do, yes.

Q. Who was it—whose writing is that?

A. I think you will have to ask her.

Q. Do you know whose handwriting it is?

A. Yes, I do. [63—50]

Q. Whose is it? A. Margaret's.

Mr. MURPHY.—We offer the letter in evidence.

The COURT.—The only part of it admissible at this time is Mrs. Bowles' part of the letter.

Mr. MURPHY.—I will read that portion of it into the record.

The COURT.—Very well.

Mr. MURPHY.—(Reading:)

"Hello Pat Dear: Well, here we are and aint we got fun. Ye Gods it's sure cold here and I'm official fire builder. Do wish you were here, we'd have all kinds of fun. Guess Peg's told you all the news. We leave for Anchorage next week. Do wish it were all over. Be good dear and take care of yourself. As ever,

MILDRED."

Q. Now, you testified in your examination in chief about leaving the employment of the Kellys—you spoke about leaving there, when you left finally? A. Yes.

(Testimony of Mildred Hilkert Bowles.)

Q. Did you ever have any dispute with them at that time as to the ownership of these clothes?

A. Not that night.

Q. Did you later, before leaving?

A. Yes, sir.

Q. I will ask you if you went over to see the marshal about it? A. Yes.

Q. Had you paid for those clothes at the time you wished to take them away?

A. We not only paid for the clothes but were never paid any wages for the two weeks we were there and Kelly not only tried to keep the clothes, was not only holding the things he bought but everything else—our trunks, including our pet animals.

Q. What animals? A. Pup and cat.

Q. You say positively that Kelly never gave you any money at all [64—51] while you were there?

A. He never gave us a cent.

Q. Did the money that you were to receive from him include board for you? A. No.

Q. Did you draw any money for supplies and food?

A. No, we opened a charge account at the Co-operative Store, which was paid recently by us.

Q. And was all of this stuff you got at the Co-operative Store used while you were at Kelly's or after you left there?

A. Yes, we never bought a thing at the Co-operative Store after we left Kelly's and charged it—everything was bought and paid for.

(Testimony of Mildred Hilkert Bowles.)

Q. Where did you go to work after you left?

A. Didn't go to work, for several days, and then went to the Central pool-hall.

Q. Where is the Central pool-hall?

A. I don't know what street it is on.

Q. It is down below C Street, is it not, on 4th?

A. It is the corner below the Union Cafe.

Q. Did your sister get employment at the same time? A. No, not at that time.

Q. Where did Peggy go to work?

A. She went to work three or four days, I am not sure, for Mr. Belmont who just started up in business.

Q. What business—another pool-room?

A. Just soft drinks and cigars.

Q. Where is that located?

A. It is next door to the grocery-store that is on the corner of Main Street, near the Central pool-hall.

Adjourned until Thursday at 10 A. M. [65—52]

Thursday, February 23, 1922.

MORNING SESSION.

Continuation of the Cross-examination of MILDRED HILKERT BOWLES by Mr. MURPHY.

Q. You have talked this matter over with the Government officials a great deal, haven't you?

A. Not very much.

Q. With a great many of them—You have talked it over with Mr. Truitt?

A. At the time the grand jury came in.

(Testimony of Mildred Hilkert Bowles.)

Q. And you have talked it over with Mr. Duggan? A. Yes, some.

Q. And Mr. McCain?

A. Just the last day or two.

Q. And Mr. Hurley?

A. Well, just the last day or two.

Q. And Mr. Mossman?

A. No, very little to Mr. Mossman except at the time about the clothes.

Q. Have you talked it over with Mr. Casler?

A. Not directly on the case—he would ask a few questions.

Q. Mr. Bouse? A. No.

Q. Mr. Brenneman? A. No.

Q. Mr. Roseen? A. No.

Q. Did you talk it over with Mr. Kitzmiller here?

A. No, nothing about the case—I never talked to Mr. Kitzmiller about the case.

Q. Did you talk it over with the other patrolman, Mr. Watson? [66—53]

A. Nothing about the case.

Q. The other day you said in your examination in chief that you did some card playing over at Kelly's. Did you learn to play cards after you came up here? A. No.

Q. You knew before you came here?

A. Yes, sir.

Q. How long after you left here was it before you were married?

(Testimony of Mildred Hilkert Bowles.)

A. Left here on the 11th of October and I was married on the 5th of November.

Q. Were you in Seward a while before you went to Valdez?

A. Just over one night—I took the train and then the boat.

Q. You like the country up here?

A. Yes, sir; I do.

Q. A pretty good country? A. Yes.

Q. Glad you came up, aren't you?

A. Not to Anchorage, no.

Q. You are glad of the trip to Alaska?

A. Yes.

Mr. MURPHY.—That's all.

Redirect Examination by Mr. DUGGAN.

Q. Mrs. Bowles, will you describe to the jury the language used by the defendant Kelly in introducing you to men?

A. Why, Kelly would usually say, "Boys, I want you to meet the girls, this is new stuff, Kelly's famous beauty, new stuff, just from the states—what do you think of them? Look them over."

Mr. RAY.—We ask that this is stricken. It is not in chief.

Motion denied; defendants except.

Q. Were you in the service during the war? [67—54] A. Yes.

Q. In what capacity? A. As a yeomanette.

(Testimony of Mildred Hilkert Bowles.)

Q. Where? A. Bremerton.

(By Mr. MURPHY.)

Q. Under what name did you enlist as yeomanette?

A. Mr. Murphy, seeing that this has no bearing whatever on this case, I decline to answer.

Q. Who was chief yeomanette?

A. Margery Wilson.

Q. How long did you serve?

A. From the 28th of June, 1917, to November, 1918.

Q. The other day you stated you were in charge of all the work in the Pig'n Whistle—how long were you in charge of all the work?

A. On the floor I said—by that I mean I had under my jurisdiction all the waiters, the boys in the dining-hall—I was in charge, superintendent of service.

Q. You had nothing to do with the entertaining?

A. No, sir.

Q. How long were you entertaining at the Butler? A. Two days.

Q. How were you advertised in the bill?

A. I was taking the place of a girl in the bill.

Q. Do you recall how you were advertised?

A. There was no advertising—I was merely taking her place for a few days, a girl that was ill.

Witness excused. [68—55]

Testimony of Margaret Hilkert Johnson, for the Government.

MARGARET HILKERT JOHNSON, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. What is your name?

A. Margaret Hilkert Johnson.

Q. Are you acquainted with the defendants Frank Kelly and Mrs. Grace Kelly? A. I am.

Q. When did you come to Alaska?

A. I arrived in Anchorage the 20th of August.

Q. How did you happen to come?

A. My sister received a telegram from Mr. Kelly offering us work as entertainers, at his place, and in answer to that message we came on the "Alameda."

Q. Did you come in response to that telegram?

A. Yes, sir.

Q. When did you leave Seattle?

A. We left Seattle the day the "Alameda" sailed—I believe that was the tenth of August.

Q. I show you Government's Exhibit "H," purporting to be a steamship ticket and ask you if that is your name signed to it? A. Yes, sir.

Q. Did you sign that? A. Yes.

Q. Is that the ticket upon which you traveled?

A. Yes, sir.

Q. Where did you get it?

(Testimony of Margaret Hilkert Johnson.)

A. Got it at the steamship office in Seattle on Second Avenue.

Q. Whom from, do you remember the gentleman?

A. I don't remember the gentleman's name, I remember his face—he was the gentleman in charge of the steamship office. [69—56]

Q. And did you get to travel on the steamship on that ticket? A. Yes, sir.

Q. When you came to Anchorage, who, if anyone, did you meet?

A. Mr. Kelly met us at the railroad station, with a car.

Q. Where did you come?

A. We went up to his place of business.

Q. What, if anything, did he say at the time you got there?

A. When we arrived he told us, "This is the place, girls. How do you like it?" and we went inside and met his wife.

Q. What, if anything, was said about quarters?

A. We suggested that we should go to a hotel and find a room and Mr. Kelly told us we didn't need to, that his wife had prepared an apartment for us over the pool-hall.

Q. And where did you stay during the period of your employment with the defendants?

A. We lived in this apartment over the pool-hall.

Q. What part of the pool-hall is it?

A. It is over the front part, faced on the street—I don't know, it is right over what they call the

(Testimony of Margaret Hilkert Johnson.)

bathroom, projects over a considerable part of the cabaret.

Q. Did you have any conversation with either of the defendants regarding clothes? A. Yes.

Q. Will you tell what was said?

A. On the first evening Mrs. Kelly asked us what we had to wear and we told her we had a couple of organdie dresses we considered quite suitable and she asked us what they were like and we described them to her and she said she didn't think they would do. Kelly listened, and said we wanted something startling, the following night would be the first night, the grand opening and the boys would all be there to look us over [70—57] and we wanted something startling, something bright, and the next morning about 11 Mrs. Kelly came and asked to see the dresses and we showed her the dresses and she said they wouldn't do, they were not startling enough, we needed something different and to go and see what we could find, and we went to the stores and looked around and came back and told her we couldn't find anything and she told us she would go with us and we would find something and she took us first to see Miss O'Bryan, and introduced us as the girls that were working for them and said we wanted some dresses to wear and Miss O'Bryan brought out some queer looking garments and showed us and told us that was what the girls usually wear and I asked what girls—I wouldn't wear dresses of that kind.

Q. You were the one that asked the question?

(Testimony of Margaret Hilkert Johnson.)

A. I think we both asked the question, we usually talk at once, and she told us that was the type of dress that the girls usually wore and I asked her what girls and I told her I wouldn't wear that style of dress, it appeared to me almost like a kimona—

Mr. RAY.—We move to strike out how it appeared to her.

(Stricken out.)

Q. What was said?

A. I made that remark, that it looked like a kimona to me.

Q. What was said?

A. Then a black dress was brought out, that was a formal evening dress and that was decided upon for my sister. Then we went to Mrs. Ashton's and looked at dresses there and there was one dress shown to me that Mrs. Kelly said would do; it had bodice top and straps over the shoulder, long sleeves, and I refused to take it because it looked as though it had been worn and I [71—58] said as much, and the girl in the outer room told me—

Mr. RAY.—We object.

The WITNESS.—What she said explains a great deal about it.

Q. Was Mrs. Kelly there?

A. Yes, she was standing there, she could have heard it.

The COURT.—You may omit that.

(Testimony of Margaret Hilkert Johnson.)

The WITNESS.—I didn't buy that dress—I didn't buy it because it had been worn by a girl on the line and had been returned to Mrs. Ashton. Then we went to Mrs. Dougherty's and there I found a dress I thought would do; it wasn't extreme, it had sleeves, although the neck was low, and I told Mrs. Dougherty I would take the dress.

Q. Did you take the dress?

A. I did when alterations were made; it was too long but it was shortened slightly.

Q. As I understand it, your sister got a dress at Miss O'Bryan's? A. Yes.

Q. And you got a dress at Mrs. Dougherty's?

A. Yes.

Q. When you took your dresses home, what if anything was said by the defendants or either one of them regarding the dresses?

A. They didn't see them until we came down stairs about six o'clock, ready to go to work, and Mr. Kelly came into the back room to look us over, see how we looked, and Mildred made the remark she felt as though she was undressed and Kelly said to both of us, "Well," he said, "that's the way the boys like it, the less you have on the better, they like it short at the top and on the bottom," and he looked at my dress and said, "Where did you get that thing?" "I bought that at Mrs. Dougherty's; you should like it, it goes well with your famous green dress"—it was Kelly green—and he said it would do until [72—59] I could get something different later on.

(Testimony of Margaret Hilkert Johnson.)

Q. Calling your attention to the first day or the first evening you were there, did you make any trip with the defendants?

A. The first evening we went to work, we did.

Q. Where, if any place, did you go?

A. We went out to Lake Spenard.

Q. Who was present?

A. Mr. and Mrs. Kelly and the driver of the car and two other gentlemen, my sister and myself.

Q. Was there any liquor drunk? A. Yes.

Mr. RAY.—We object as leading and move to strike the answer.

Objection overruled and motion denied.

Q. What was the condition of the party as to sobriety?

Mr. RAY.—We object to that. Kelly is not being tried for drinking or for going out in company with other people.

The COURT.—It is admissible as showing the kind of atmosphere these girls were brought into after their arrival. * * * The question can only be considered as bearing on the intent with which the defendants brought these girls up here and for no other purpose. Objection overruled. Defendants allowed an exception.

A. They were all more or less under the influence of liquor, one or two more so and some of them not so much.

Mr. RAY.—We make the further objection and move to strike on the ground that this testimony

(Testimony of Margaret Hilkert Johnson.)

is incompetent, irrelevant and immaterial and does not tend to prove the issues in the case.

Objection overruled and motion denied; defendants except.

The COURT.—The testimony is admitted for the sole purpose of proving intent, if it has any tendency to do that.

Mr. RAY.—It is understood that there is an objection on the [73—60] part of each defendant to this line of testimony now sought to be elicited.

The COURT.—Yes, I understand that all objections are made in behalf of both defendants and it is understood that all the testimony in regard to this particular occurrence, this trip to Lake Spenard, goes in under the objection of both defendants.

Q. When you came back from the trip where did you go?

A. We went up to Mr. and Mrs. Kelly's apartment, in the back of the hall.

Q. What, if anything, was said there by Mr. or Mrs. Kelly?

A. When we started to leave the apartment and go to our apartment Mrs. Kelly detained me for a few moments saying she had a coffee-pot for us to use in the morning when we woke up and my sister went up to the apartment and I stayed and talked until suddenly I said, "Where's Mildred?" and I asked Mr. Kelly if he would go and call her —Mrs. Kelly offered to get some coffee and I asked Kelly to call Mildred back and he went out of the

(Testimony of Margaret Hilkert Johnson.)

apartment, presumably to our apartment, and when he came back I said, "Where's Mildred, isn't she here?" and he said, "No, she is fixing her hair, she will be here in a few minutes." We went on talking and in about ten minutes I said, "Where's Mildred? It's strange she doesn't come back, it doesn't take her that long to comb her hair," and I started out of the apartment and as I walked into their kitchen I met Mildred coming through the door, and I said, "Where have you been?"

The COURT.—Were Mr. and Mrs. Kelly within hearing?

The WITNESS.—Yes, they were standing there —and she replied, "Where have you been?"

Q. Did any of the party accompany Mildred to the room?

A. I don't know whether they accompanied her or not but there was a gentleman went to the apartment—I don't know that he walked [74—61] up with her but he went to the apartment and he came back right behind her—he had been there.

Mr. RAY.—We ask that the last statement be stricken as a conclusion of the witness.

(Last statement stricken out.)

Q. Did you see him in the apartment?

A. I did not see him in the apartment—I was down in the other apartment.

Q. Did you see him coming out?

A. Not out of our door.

(Testimony of Margaret Hilkert Johnson.)

Q. What, if anything, was said by the defendants or either of them regarding your duties?

A. We asked what we were to do—

Q. Let me ask you, when did you first have any conversation regarding your work or duties there?

A. The day after we arrived.

Q. You say you came on the 20th? A. Yes.

Q. Then that would be the 21st?

A. Yes, sir.

Q. What was said and by whom, that is regarding your duties?

A. Mrs. Kelly told us our orders, that we were to play and sing at intervals during the evening and when we were not playing or singing, we were to help Kelly if he needed it, that we were to help him serve beer and white mule and to drink with the guests—

Mr. RAY.—We object to that and move to strike the answer.

Objection overruled and motion denied; defendants except.

The WITNESS.—(Continuing.) Because when we drank with the boys, they bought more; if we stood and talked and drank with them, they would stick around longer and they would buy more beer. [75—62]

Q. While you were in your room, did anyone come to the room?

Mr. RAY.—We object unless the defendants are connected up with it and knew something about it.

(Testimony of Margaret Hilkert Johnson.)

The COURT.—You will have to connect it with the defendants in some way.

Mr. DUGGAN.—It is preliminary to opening up a matter that is material.

The COURT.—If this is a preliminary question the objection will be overruled.

Defendants allowed an exception.

A. Yes.

Q. Can you tell about what time it was, as to the date and the time of day, the first time?

Mr. RAY.—We object to that "first time."

Objection overruled; defendants allowed an exception.

A. I believe it was on Monday, the first Monday we were there and our first visitor arrived about eight o'clock.

Q. What day did you arrive, the 20th?

The COURT.—The Court will take judicial notice of the fact that the 20th was Saturday.

A. I don't know what the date was but I believe it was Monday, about eight o'clock in the morning; some one rapped on our door and came in. We had no key to the apartment at that time. It was a man they called Russian John.

Q. Do you know his full name?

A. Magoff, I believe—I don't know whether that pronunciation is correct or not—John Magoff.

Q. What occurred there?

A. He came in with a few bottles of beer and asked us concerning a dinner party that we were to give him that afternoon, asked [76—63] us

(Testimony of Margaret Hilkert Johnson.)
if he could come and we said, "Yes," but to get out then, that we were tired—we had retired late, so he left after drinking one or two of his bottles of beer and about ten o'clock sent up a chicken for the dinner that afternoon—he returned again about two for the dinner.

Q. Was anything said to you by the defendants or either of them about his coming there for dinner? A. Yes.

Q. Who said it?

A. Mr. Kelly suggested it to us first.

Q. What did he say?

A. Sunday evening he said that big John had fallen for Mildred and that he had lots of money and the proper thing to do was to give him a little dinner in our apartments, that sour-doughs like that little touch of home life, and to put up a hard-luck story to him. He said, "Get him up in your apartment, give him a little dinner and you know the rest—you can entertain him better than I could"; he said, "I will talk to him this evening and give him a hard-luck story"; and he said, "You said you would like to have a fur coat; you can get two or three out of him if you play your cards right."

Q. What, if anything, did this man John Magoff say to you—go ahead and tell what he said.

A. When he came to dinner, you mean?

Q. Yes. Did you hear him say anything to Mildred?

(Testimony of Margaret Hilkert Johnson.)

Mr. RAY.—We object to any conversation between these ladies and their guest when the Kellys were not present.

Objection sustained.

Q. Did you talk to Kelly about Magoff?

A. Yes. [77—64]

Q. What was said in that conversation?

A. We asked him what was the idea in sending that man up there to our room loaded down with beer and in view of the question he had asked—

Mr. RAY.—We object to that.

The COURT.—State what was said by you or Kelly.

A. We told him we didn't want him hanging around, we didn't like him—we couldn't understand what he was talking about, and didn't want him there and Kelly informed us very plainly that we were damned fools.

Q. Was anything said about an offer?

A. Yes.

Q. What?

A. We told him he had offered a hundred dollars to stay with my sister and Kelly said, "Do you mean to tell me that you turned that down?" and she said, "I certainly did," and he said, "All I can say to you is that you are both damned fools and you will end up in the poorhouse if you keep on that way."

Q. Did he say anything further at this time?

A. He said then if we would play our cards right and listen to him—that he had pointed out to us live

(Testimony of Margaret Hilkert Johnson.)

guys and would continue to do so—and if we listened to him, we could all go out of here with enough to keep us, that we girls could make six or seven thousand dollars and when we got outside, nobody need to know how we got it.

Q. Were there any crowds there? A. Yes.

Q. Were they large crowds or small crowds?

A. Large crowds for a town of this population.

Q. What kind of crowds? [78—65]

A. They were made up on intoxicated foreigners and soldiers.

Q. Altogether?

A. Yes, they mingled together.

Q. No other kind?

A. There were a few business men came in but they didn't loiter long and we had very little to do with them—we were not encouraged to hold conversation with them.

Q. The kind of crowds that you have described, was that the kind that was there all the while or not?

A. All the while that I was there—there was a continuous flow of soldiers and foreigners.

Q. In regard to the talk, what kind of talk was prevalent there?

A. Language that I had never heard in my life but language that a woman would not repeat.

Mr. RAY.—We object and move to strike.

Objection overruled and motion denied; defendants except.

Q. Did you have a key to your apartments?

(Testimony of Margaret Hilkert Johnson.)

A. Yes.

Q. When you got the apartments, were you given a key to them at the same time? A. No.

Q. What, if anything, did the defendants or either of them say,—how would they announce a number or selection?

A. Mr. Kelly would say, "Peggy, go up and tear off one for them, come up and tear off a little one for the boys," and when he asked my sister to play he said, "Come and jazz them up a little bit, Mildred, give the boys a little jazz, they like it."

Q. Did you have any talk in the presence of the defendants with an old man there?

A. Yes, a friend of Mr. Kelly's.

Q. About what time was this? [79—66]

A. I don't know, it was along in the evening—one evening when we were busy.

Q. About what time?

A. It was three or four days after we arrived—I don't know just the date or hour.

Q. Where was it?

A. In the pool-room. I was standing behind the showcase of cigars—the bar, I guess they call it.

Q. What was said?

A. This gentleman, when I gave him a bottle of beer, asked me if I would stay with him that night and I said, "I certainly won't, I don't do those things"; and he said, "Beg your pardon, some girls do and some girls don't,—you never can tell,

(Testimony of Margaret Hilkert Johnson.)
you miss a lot of good things by not asking," Mr. Kelly was standing right beside me serving beer to some chaps from out on the line and he looked at the old chap and winked and said, "She's a little bit shy, you want to be careful about talking to her like that, she is shy before other folks," and laughed, and the entire crowd laughed, and the old man couldn't continue his conversation because I left.

Q. Did he say anything at this time about getting anything he wanted?

A. That evening Mr. Kelly was drinking with the boys and he said, "Boys—"

Q. Were you present?

A. Yes. He said, "Boys, you can get anything in this house as long as you have got the money to pay for it."

Q. Did you have another conversation at which the defendants or either of them were present in the back room? A. Yes.

Q. About what time was that, do you recall? [80—67]

A. Some time during the first week.

Q. Can you fix the time closer than that?

A. No, I can't, I don't know what particular night it was—it was some time toward Friday.

Mr. RAY.—We object to this.

The COURT.—It all goes to the question of intent.

Q. Tell what was said, tell the conversation.

(Testimony of Margaret Hilkert Johnson.)

A. One conversation in particular that I had with Kelly in the back room—he called me in to talk it over with me and he sat at the table and he said, "Peggy, you are little and fat and the boys like you," and he said, "If you will listen to me you can get out of here with some money"; he said, "I will give you the tip as to the live guys and you can take them up to your apartment and entertain them," and I looked at him, and he said, "You don't have to do anything wrong any more than lifting this jar and setting it back, if you don't want to, but you will get a great deal more out of it if you do."

Q. Calling your attention to an incident in the back room, did you have any trouble in this back room that you have spoken of, with foreigners?

Mr. RAY.—We object as leading.

The COURT.—It is preliminary.

A. Yes.

Q. What happened?

A. Kelly called me one evening and he said, "Peggy, there are some friends of yours in here that want to see you," and I said, "Friends of mine in this place?" and he opened the door and took me in and as he stepped inside the door, he threw his arm around my neck and said, "Boys, I want you to meet my sweetheart; isn't she little and soft and fat?" and there was laughter and immediately they wanted to find out if [81—68] I was soft and fat and I objected to them putting

(Testimony of Margaret Hilkert Johnson.)

their hands and arms around me and I went out, but I was called back—

Q. Who called you?

A. Kelly—"Come and drink with the boys," he said—"as I told you if you drink with them, they will stay longer and buy more"; he said, "That is what you are here for, to help sell that stuff"; and I said, "I don't want to drink, I don't like it," and he said, "That don't make any difference, come in," and when I went in, a big Greek took me clear off the floor with his arms and it made me sore and I called for Mildred and started to fight and I got out of there, and they got up and walked out. There had been a little trouble between them and Mildred and my trouble made them angry and they got up and went out and Kelly said, "What do you mean? You are driving my business away; there goes three or four hundred dollars this evening and you have driven them out—what is the idea? You are regular touch-me-nots."

Q. In the presence of the defendants did you meet any prostitutes at this place? A. Yes.

Q. Calling your attention to the first instance—what time was that?

A. It was eight or nine o'clock.

Q. What day was it?

A. It was during our first week at Kelly's.

Q. What was said.

A. Mrs. Kelly came to the door of the back room and called, hollered to us, "Girls, come here, I want you to meet some of the girls from the

(Testimony of Margaret Hilkert Johnson.)

line," and we went over and asked her if she expected us to associate with them and she said, "They won't rub off and they're alive; they spend good money, they want to meet some of the chaps; come in and meet them," and we went in [82—69] and met them.

Q. Who introduced you? A. Mrs. Kelly.

Q. Did you at any other time meet the same kind of people?

A. The same kind, but not the same ones.

Q. The first that you have just testified to, do you remember the names of any of them?

A. There is just one I remember, because her name was the same as mine,—they called her Little Peggy; I don't know what her last name was, and I don't remember the others, but I remember her.

Q. Can you describe them?

A. One of them had bobbed hair and this little girl had dark hair and dark eyes—she was extremely pretty and didn't look—she did not look like what I thought she was.

Q. Did you at any subsequent time meet the same kind of people there? A. Yes.

Q. Can you set the date, the day?

A. No, I cannot—the second time we met any of them was in the early part of the second week—I don't know whether it was Monday or Tuesday or Wednesday.

Q. Were the defendants present or either of them? A. Yes, sir.

Q. Who was present when this happened?

(Testimony of Margaret Hilkert Johnson.)

A. Mrs. Kelly introduced us that time and Mr. Kelly came in several times while we were with them.

Q. What was said by Mrs. Kelly?

A. She just introduced us to some of the girls; she told us they were girls from the line and took us in and introduced us as the girls working there and one of them asked me to sing, and [83—70] later we went back and they invited us to drink with them on that occasion.

Q. What, if anything, was said by Mr. Kelly?

A. On that occasion he didn't say anything,—it was the occasion before when he asked us—they invited us to go down hopping; asked if we would like to go.

Q. State what was said by Mrs. Kelly?

A. She said, "Go ahead, girls, Frank and I had several enjoyable evenings with the girls of the town but we can't go now, we are too busy and it doesn't look well for the business"; she said, "They were very nice to us and we had a lovely time," and Mr. Kelly came in just then and she said, "Frank, do you remember when we went to so-and-so's house?" I didn't catch the name.

Q. What did Mrs. Kelly say on the second occasion, if anything?

A. On the second occasion when we were invited to go down, she told us to go down and see some of their places, and—

Mr. RAY.—We object to this.

Objection overruled; defendants except.

(Testimony of Margaret Hilkert Johnson.)

Q. You may proceed.

A. Mr. Kelly asked me if I had ever been in a place of that sort and I said, I had not and didn't care to go and she said, "You ought to go down and see how those girls do business."

Mr. RAY.—All this goes in under our objection.

The COURT.—You should renew the objection whenever a new transaction is brought in.

Mr. RAY.—In order to prevent interruption I requested the Court to consider that the testimony last sought to be elicited was under our objection, on the ground that it did not tend to prove the issues and was introduced for the purpose of inflaming the minds of the jury. [84—71]

The COURT.—On your statement that you understood the Court allowed your objection to stand for all of this evidence, the record will show that that is your understanding and the Court will allow the record to show that you do object to all of this. There was some testimony given a while ago that I would have excluded if you had made a motion for it because it was, I think, beyond the question of intent, but all of this will be subject to your objection and exception. I will explain to the jury why this is admitted and how far they can use it.

Q. Did you meet a man at Kelly's place by the name of Laroque? A. Yes.

Q. Where did this take place?

A. In Kelly's pool-hall.

Q. What place in the pool-hall?

(Testimony of Margaret Hilkert Johnson.)

A. Back by the piano.

Q. About what time—what day was it?

A. It was Saturday before Labor Day.

Mr. COFFEY.—We object as too remote.

Objection overruled; defendants except.

Q. What did Laroque say to you?

Mr. RAY.—We object to that as incompetent, irrelevant and immaterial and not tending to prove any of the issues of the charge against these defendants.

The COURT.—The objection will be sustained unless it is a preliminary question that can be connected up.

Mr. DUGGAN.—We can't connect it by this witness with Kelly but we can connect it by another and we contend therefore that it is material.

The COURT.—You may ask the question.

Defendants allowed an exception to the ruling.

A. Well, he talked to me; part of it I couldn't understand [85—72] because I didn't pay any attention, but he did ask me if he could stay with me that night, and Mr. Kelly had told me that he was a live guy.

Mr. RAY.—We move to strike the last part of that answer.

(Last part of answer stricken.)

Q. What, if anything, did Mr. Kelly say to you about him?

A. He told me he was a live guy.

Mr. RAY.—We object to that.

(Testimony of Margaret Hilkert Johnson.)

The COURT.—Was it before or after this that Mr. Kelly spoke to you about this man?

A. He spoke to me before I met him and he spoke to me while he was there and he spoke to me again concerning him after the fellow had gone.

The COURT.—It may be admitted.

Defendants allowed an exception to the ruling.

Q. What did you say Kelly said?

A. He told me he was a live guy. The first time he mentioned it he told me that chap had been off the line on the 4th of July and had spent about $450, that he hadn't been in since and he had plenty of money and he was a live guy and not to let him get out of the place.

Q. Did he say anything to you about it afterwards?

A. Yes—after the chap had gone?

Q. Yes. Did you see him afterwards, Laroque?

Mr. RAY.—We object to that.

Objection overruled; defendants except.

A. No, I never saw him again until I came back this time.

Q. What did Kelly say afterwards, if anything?

A. He said, "What do you mean by letting that fellow get out of the place?" he said, "I told you he was a live guy; he fell for you, and what did you let him go out for? Now he will go [86—73] somewhere else and won't come back."

Q. Did you see a man at this place, a soldier, by the name of Sergeant Kelly? A. Yes, sir.

(Testimony of Margaret Hilkert Johnson.)

Q. Was anyone with him? A. Yes.

Q. Who was it?

A. The first time there was a woman with him.

Q. About what time, do you remember?

A. About 11 o'clock.

Q. What day? A. I don't know the date.

Q. As near as you can remember?

A. It was during the first week some time but I don't know what one of those days, but it was during the first week we were there.

Q. Who was the woman?

A. I don't know her name.

Q. Who was she?

A. She was one of the girls from the line.

Mr. RAY.—We object to that.

The COURT.—I presume it is preliminary.

Q. Did Mrs. Kelly or any of them know these people were there? A. Yes.

Q. Go ahead and tell what happened.

A. This girl would come in and Mrs. Kelly would go into the back room with her and then would go upstairs to Mrs. Kelly's apartment, and later this soldier, Kelly, would follow. At one time there were two of them, an older woman and this one girl and they went back to the apartment and this chap went upstairs and Mrs. Kelly entertained them in the back. [87—74]

Mr. RAY.—We move to strike that.

The COURT.—It may be stricken.

Mr. RAY.—Now, we move the jury be instructed to disregard it and the defendants object to the continued attempt to introduce testimony without

(Testimony of Margaret Hilkert Johnson.)
the rule laid down by your Honor, the only object of which can be to inflame the minds of the jury as to other offenses than that stated in the indictment.

The COURT.—Gentlemen, all this testimony goes only to the possible bearing it may have on the question of intent, of which you are the exclusive judges, as you are of all the other facts in the case. Nothing is admissible for the purpose of showing any other offense than the one charged in the indictment, but it is admissible incidentally to prove other offenses if it has a tendency to show the intent with which these defendants acted. This testimony is stricken out because the Court holds it has no such direct tendency.

Q. Did Mr. Kelly ever speak to you about a hunting party? A. Yes, he spoke to me.

Q. Can you fix the time?

A. It was the Thursday or Friday before Labor Day. There were three big days coming up—it was Thursday or Friday before that, before Saturday, Sunday and Monday.

Q. What did he say?

Mr. RAY.—We object to that as incompetent, irrelevant and immaterial and not tending to prove any of the issues in the case and has been ruled out by the Court with reference to the witness Mrs. Bowles.

The COURT.—It was admitted to allow the jury to consider it in connection with the intent. The objection will be overruled and exception allowed. [88—75]

(Testimony of Margaret Hilkert Johnson.)

A. He said, "Well, it will soon be over, girls, we have three hard days ahead of us." He said, "The old lady is going on a hunting trip and when she is gone Mildred and Sid and I and you will have a regular party," and I said, "What do you mean by a regular party?" and he said, "We will have two or three quarts of good stuff to drink, we will have bonded stuff. We will sell the mule here but we will drink good stuff," and Mildred said, "Do you mean a bedroom party, Kelly?" and he said, "Sure, you are only human and it won't hurt you once."

Mr. DUGGAN.—I think that is all.

Cross-examination by Mr. RAY.

Q. Your name is Hilkert? A. It was; yes.

Q. What is the name of the young man you married recently? A. Johnson.

Q. And when were you married?

A. The 14th of January.

Q. Just after New Years? A. Yes, sir.

Q. Before you came to Alaska had you been entertaining in public places?

A. No, sir; I never entertained in my life—I have sung in church, church choirs, and Ladies Aid Societies and tea parties, but never entertained.

Q. Was this in Seattle?

A. Seattle or anywhere where I have ever lived; never have entertained.

Q. Did you ever sing in the Butler Hotel?

A. No—my sister did but I never did.

Q. Your sister sings? [89—76]

(Testimony of Margaret Hilkert Johnson.)

A. Yes.

Q. And plays the piano? A. Yes, sir.

Q. How long has she been in public entertaining?

A. I don't know just how long. I know about five or six years ago she did a little entertaining and two or three years ago she entertained a couple of evenings at the Butler and helped entertain at Kelly's this last year.

Q. Just the last year didn't you both have an engagement at the Butler?

A. No, nothing at all.

Q. At the Pig'n Whistle?

A. I worked for her about a week at the Pig'n Whistle, just before the 4th of July.

Q. Did you sing there?

A. No, I helped with the table.

Q. And what was your sister doing?

A. She was superintendent of service.

Q. Is that what you call in a big establishment a head waiter?

A. No, it wasn't a head waiter. She had charge of the girls—she settled difficulties between the girls and the manager—she saw that the service was good, that things ran smoothly, without friction, as far as possible.

Q. Where were you living in Seattle?

A. At the Normandie Apartments—509 of the Normandie Apartments.

Q. Had you lived in the Green Lake country before this?

A. No, never lived at Green Lake as far as I can remember.

(Testimony of Margaret Hilkert Johnson.)

Q. How long have yourself and your sister been together—were you with her during her marriage there? A. No, very little.

Q. How long have you been with her? [90—77]

A. At different intervals; there were times we were together and times separated—I don't know how long.

Q. You are quite sure you had no engagement at the Butler Hotel when you came up here?

A. I am perfectly sure—I danced at the Butler as a guest but never worked there and had no desire to do so.

Q. Had you been married before you came to Alaska? A. No.

Q. Had you taken part in church entertainments, singing in church concerts?

A. At no time.

Q. Where had you had your public training as an entertainer? A. I never had any.

Q. Did you attend a dramatic school?

A. I never did.

Q. Just a natural talent you had? A. Yes.

Q. Have you been a cabaret performer?

A. No.

Q. Never have—until you came to Alaska?

A. Never have—that wasn't a cabaret entertainment.

Q. You know what a cabaret is?

A. I do—I have gone to them as a guest.

Q. At the time you received this wire, on the first day of August, addressed to Mildred Hilkert —you say she is your sister?

(Testimony of Margaret Hilkert Johnson.)

A. Yes,—we will call it that, yes.

Q. Do you know Fred Waller? A. I met him.

Q. Where did you meet Fred Waller?

A. In Seattle. [91—78]

Q. How many times have you met Fred Waller?

A. Once.

Q. Do you know what business he was engaged in? A. No.

Q. Do you know that he was a gambler?

A. I heard it afterwards.

Q. Now, you received this wire—Fred Waller just arrived in Anchorage and spoke to me about you and your sister wanting to come to Anchorage—You told Fred Waller you would like to come to Alaska, did you?

A. Told him I always wanted to go and see Alaska.

Q. You had that same feeling that a great many people have, that they would like to see Alaska?

A. Probably.

Q. Love of adventure prompted your statement to Fred Waller?

A. It was a desire to travel, not adventure.

Q. You have had some adventure up here in meeting some very fine young men, and especially in Valdez?

A. That is not adventure; that is romance.

Q. So you found romance in Alaska?

A. Certain parts of it.

Q. After your statement to this man whom you know to be a gambler, you came to Alaska and found romance?

(Testimony of Margaret Hilkert Johnson.)

A. Not concerning him—I found no romance there; I am speaking of my husband when I say romance?

Q. Now, after you received this wire did you make inquiry as to who Ragtime Kelly was?

A. There was no one of whom we could inquire.

Q. Did you inquire of the steamship officials?

A. No—how would they know anything about him? [92—79]

Q. Did you go down to the Alaska Bureau of the Chamber of Commerce, Seattle, and make inquiry as to whom he was?

A. No, I didn't know they had one.

Q. Did you know anything about Fred Waller?

A. Yes; he was described to us as a business man.

Q. By a gentleman friend of Waller?

A. By a gentleman friend of Mr. Waller—he was introduced to us as a gentleman.

Q. Where did you meet him?

A. At the home of a friend of ours. He and his wife introduced us to Fred Waller.

Q. Did you meet him at the Butler Hotel?

A. No, I met him at the home of a friend.

Q. You are sure you didn't meet him at the Butler?

A. I am sure I never made acquaintances out in public like that.

Q. Did you go to any Ladies Aid Society in Seattle and ask them to investigate Ragtime Kelly before you entered into a contract with him?

A. No, the Ladies Aid Society wouldn't know anything about him.

(Testimony of Margaret Hilkert Johnson.)

Q. You had been under contract with these people or had been singing for them?

A. No, the last year I was there I had been ill and hadn't been singing.

Q. Were you aware of the telegrams sent in reply to the offer Kelly made to you?

A. I knew there had been a cable sent, stating what wages we would accept.

Q. I hand you a copy of the wire—(Handing witness paper.)

A. I didn't see the telegram—my sister told me about it, that she had sent it.

Q. At what price? [93—80]

A. I believe she said I was to work for $20 a week.

Q. And that was the understanding and the transportation came and you came to Alaska?

A. Yes, sir.

Q. Pursuant to this contract? A. Yes, sir.

Q. You knew that the contract had been ratified—you knew that Kelly had accepted your offer, in your wire?

A. By sending the tickets I imagine he did—there was no contract written out or signed, however, concerning our work there.

Q. You say you had had no previous theatrical experience? A. Never had.

Q. Can you say whether that statement—you both pay five dollars per week till transportation is paid out—is that the usual contract that is made with theatrical performers?

(Testimony of Margaret Hilkert Johnson.)

A. I don't know—I have never made a theatrical contract, have never seen or wrote one.

Q. Did you ever sing in public prior to your appearance here in Kelly's? A. Yes.

Q. Where?

A. I sang a year in Spokane—I sang at the Saint Paul's Cathedral, about three years ago —I was one member of the choir, nothing spectacular, except I sang in the choir. I have sung at various tea parties and club meetings of Mamma's friends and friends of mine.

Q. Where? A. Spokane and Seattle.

Q. When did you come to Seattle from Spokane?

A. The last time I came back I believe it was April, some time I [94—81] think, toward the last of April.

Q. The first or second night you arrived, there was a party on, of which you were a member and you went to Lake Spenard? A. Yes.

Q. You went back to Kelly's house and stayed there that night? A. Yes.

Q. Was the party distasteful to you?

A. It certainly was.

Q. Why didn't you leave it?

A. I had no desire to walk from Lake Spenard into Anchorage—I didn't know the road and didn't want to walk in—it was better to put up with it, and I would rather stay with my sister.

Q. Did you drink anything?

A. I sipped something over at the Frisco and didn't like it and didn't drink it.

Q. Did you drink before coming to Alaska?

(Testimony of Margaret Hilkert Johnson.)

A. A little bit, yes—we have always had wine in our own home.

Q. How far away is that home?

A. I refuse to answer—it has nothing to do with the two weeks we were at Kelly's.

Q. I don't care to embarrass you if you don't care to answer.

A. Very well, I don't—it has nothing to do with this case.

Q. Now, Peggy, after you had had a row with Kelly you talked pretty bitter toward him?

A. Certainly.

Q. I hand you this memorandum and ask you to state whether or not your signature appears thereon? (Handing paper to witness.)

A. Yes, that lower one is mine.

Q. Margaret Hilkert? A. Yes.

Q. And the other signature on that, is that Mildred Hilkert? [95—82]

A. Yes, sir, it looks very much like it.

Q. Did you see her write it at the time?

A. I did.

Q. At the time you left Kelly's you agreed there was some indebtedness due to Mr. Kelly?

A. Mr. Kelly informed us there was.

Q. Did you and Miss Mildred Hilkert sign any memoranda as to the amount of such indebtedness?

A. We signed an undated I. O. U.

Q. I hand you this memorandum, marked for identification Defendants' Exhibit No. 1 as part of the cross-examination of the witness Margaret Hilkert Johnson, upon which as already stated the

(Testimony of Margaret Hilkert Johnson.)

signatures of yourself and Mrs. Bowles appear. (Showing paper to witness.) A. Yes.

Mr. RAY.—We offer it in evidence as part of the cross-examination of this witness.

It is admitted, marked Defendants' Exhibit No. 1 and reads as follows:

Defendants' Exhibit No. 1.

"I O U $227.51.

MILDRED HILKERT.
MARGARET HILKERT."

Q. You stated that from about the first of October until you went to Valdez you had quite a few talks with Mr. Truitt as to the testimony you would give in this case? A. Yes.

Q. You know Mr. Truitt? A. Yes.

Q. And with Mr. Mossman?

A. Very few with Mr. Mossman. I think I had one conversation with Mr. Mossman when we left Kelly's and two since then, since we have been in the employ of the Government, to get money to live [96—83] on, when we went to Valdez. We had two conversations with him that time I think but since then have had very little conversation with Mr. Mossman, nothing regarding the case whatever.

Q. I don't suppose Kelly's name was mentioned?

A. Yes, it was.

Q. How long have you been in the employ of the Government?

A. I think we left Valdez on the 6th or 7th of the month.

(Testimony of Margaret Hilkert Johnson.)

Q. You simply mean that you are a witness—you don't mean you are in the employ of the Government? A. No.

Q. Are you getting daily wages from the Government?

A. I don't know whether we do or not,—we get witness fees.

Q. You get $4.00 a day also?

A. Isn't that witness fees?

Q. How do you get them?

A. I haven't got them yet but I judge I will.

Q. Since the first day of October? A. No.

Q. Do you know a boy named Pat Van Curler?

A. I do.

Q. Now, I hand you three sheets of writing dated Valdez, Alaska, October 26, 1921, and ask you to state whether or not the same is in your handwriting?

A. Yes, it is, down to here (indicating).

Q. And that is in Mrs. Bowles' handwriting?

A. Yes.

Q. Mildred's? A. Yes.

Q. You wrote this letter to Pat? A. Yes. [97—84]

Q. October 26, 1921? A. Yes.

Q. You recall what is in it? A. No, I do not.

Q. You may glance at it. (Handing witness letter.) You recall the letter? A. Yes, sir.

Mr. RAY.—We ask that this letter be marked for identification Defendants' Exhibit 2, 3 and 4 (three sheets). (It is so marked.)

Whereupon recess was taken until 2 P. M.

AFTERNOON SESSION.

Continuation of the cross-examination of MARGARET HILKERT JOHNSON by Mr. RAY.

Mr. RAY.—I now offer in evidence as part of the cross-examination of this witness the letter referred to before adjournment. The letter is admitted in evidence, marked Defendants' Exhibit 2, 3 and 4 and read to the jury by Mr. Ray as follows:

Defendants' Exhibit 2, 3, 4.

Valdez, Alaska, Oct. 26, '21.

Hello Irishman—

How are you, still scratching for a living or riding on the crest of the wave by now. We have been in a revolution since you left there. We had an awful blowup with Kelly and as you see we are at Valdez as a result of it. He shot off his mouth so much after we left that the U. S. men got ahold of it and started a thorough investigation. We were subpoenaed to appear in Valdez before the Grand Jury and if the indictment is granted, it means at least five years for Kelly. You see Pat they grab him under the Mann Act, he got us up there for the purpose of hustling and we knew it after about the first week. After you left it grew worse and worse. Kelly got to drinking and he was terrible. He kept Bennie so drunk he didn't know what was going on—he couldn't help us when we needed him—didn't even realize what had happened. So we are here under the protection of the court. If it were possible I'll bet Kelly would have gotten rid of us but before we

left Anchorage we had a body guard of four men from the police force. So we were protected at last. But we will be the ones [98—85] who send Kelly and his partner up if he goes. But, Pat, haven't *you* heard *Kelly* say things *to,* or, *in front of,* people that would give them the impression that we were hustling? That's what we want to prove. We can give a lot of evidence as to what he said to *us* but what we need now to fill out our testimony is the testimony of some other person as to Kelly's telling outsiders we were there for *Service.* They sent you a telegram, or rather, sent it to the Marshal, to question you, to see if you could give any examples of his conversation to men that gave them the idea that all they needed was the price and arrange it with Kelly. We told Judge Truitt that we thot perhaps you might have overheard something while you were down there mornings or when sitting there evenings. But I guess maybe they didn't go at it right and maybe you thot we were in bad. But if you can remember at *any time anywhere,* hearing Kelly tell any one we were there for that purpose, that we would arrange it for them to come to us for that purpose, or anything of such nature, for heaven's sake let us know and you will be subpoenaed and all mileage paid to and from where you are and four bucks per day. And if they don't get Kelly, we'd better buy seven league boots or our hides will be worthless.

We are fine and Jack is so large it's all we can do to lift him from the floor. He's so cute and

smart and he *is pretty,* you'd love him to death. We gave our cat away cause Jack was getting too big for him, he would hurt it in playing.

We do miss you, Pat, and if you were here now you'd sure have a job, building fires in the cold each morning. We are in a little house and of course it does grow cold by morning. And as we eat *once in a while* there are dishes to be washed so you would always have plenty to keep you busy.

Thursday, P. M.

Hello, Pat:

We are surely in the land of Santa Claus this morning for the snow is just fluttering down in a cloud and the ground is pure white. Jack is wild when he gets outside in the snow, he rolls and roots his nose in it and barks. He sure is cute and he weighs about thirty pounds and now he is getting so rough. His teeth are like needles but he'll soon be losing his baby teeth and the new ones wont be so sharp. I'll send you a bunch of pictures and you can use your own judgment as to whether they are good or not.

We kids have a pair of hightopped leather boots for hiking. We have taken three long hikes since we've been here—we were scared to hike anywhere up in Anchorage but we know we are safe here so we make the best of it.

We may stay here for a month or two or we may go out home on the Northwestern, it all depends on how soon Kelly's case comes up, the trial I mean, and if we get a job.

(Testimony of Margaret Hilkert Johnson.)

By the way Kelly should be arrested by now and unless he can provide bail he'll have to lay it out. You'll probably be called clear back here as a witnes again. That wouldn't be so awful, would it?

There's not one thing in the way of news, Pat, and so I'll leave the rest of the page for Mildred to scratch a line.

Good luck, honey, and keep on struggling—you'll make good in no time.

Yours in snow,

PEG." [99—86]

Mr. RAY.—It is necessary that I ask one or two questions—

Q. Did you become a prostitute at Anchorage, Alaska, after August 3d. A. I did not.

Q. Did you give yourself up to debauchery at Anchorage or engage in immoral practices?

A. I did not.

Q. In reference to this I O U I was asking you about this morning—to whom was that given?

A. It was given to no one—it was given to us to sign and we signed it and that was the last we saw of it.

Q. Who gave it to you to sign?

A. Kelly gave us that slip of paper.

Q. Did you give it back to him?

A. It was left on the table—I signed that name and after that I didn't see it again, until you showed it to me this morning.

Q. Was any one else there?

A. Mildred was there.

(Testimony of Margaret Hilkert Johnson.)

Q. Mildred didn't take it away with her?

A. No.

Q. And you didn't take it away with you?

A. No.

Q. Kelly was there when you signed it?

A. He was there, yes.

Q. And you signed it? A. Yes.

Q. Do you remember the date that was?

A. No—I have forgotten.

Q. Did you talk anything about this case since the noon adjournment, with anyone, Mr. Duggan or Mr. McCain or Mr. Hurley? [100—87]

A. Not about the I O U.

Q. Did you talk about the testimony you gave here—have any discussion with the United States Attorney's office since the noon recess?

A. I don't think that has anything to do with the case.

Q. Did you have any conversation with the attorney's office or any member thereof since the adjournment, since you left the witness stand at twelve o'clock to-day?

A. Certainly, I had conversation.

Mr. RAY.—I think that is all.

The COURT.—Speaking of this I O U, which is marked Defendant's Exhibit 1—was this signed before or after you left Kelly's place?

A. It was left, after we quit working there.

The COURT.—I think it has been sufficiently identified as being the paper she signed at Kelly's request.

(Testimony of Margaret Hilkert Johnson.)
(By Mr. DUGGAN.)

Q. Counsel has asked you about your singing at church—are you a member of any church?

A. Yes, sir.

Q. What church? A. The Catholic.

Q. And is your sister? A. She is.

Q. Did Mr. Kelly or Mrs. Kelly pay you any money for your services?

A. We didn't receive a cent in payment, all the time we were there.

Q. How much, if any, money did you have when you left Kelly's? A. Between us we had 35¢.

Q. Now, in regard to this letter just read—did you write that [101—88] at the suggestion of anyone?

A. Judge Truitt suggested I write and ask Pat if he knew anything about this, saying perhaps he didn't understand the case and through some sense of gratitude to us and our friendship to him, he didn't care to make any statement to the marshal when questioned, and he told me it would be a good plan to write and tell Pat just what occurred and tell him if he knew anything to go and tell it.

Q. You made a statement, I believe, on the stand that you were employed by the Government, under cross-examination you stated you were in the employ of the Government? A. Yes.

Q. Did you mean that you were hired?

A. No—I didn't use the proper English there. I should have said I was subpoenaed and I received witness fees.

(Testimony of Margaret Hilkert Johnson.)

Q. Now, where is the man to whom this was written, who is he?

A. A personal friend of ours that we met in Spokane, a lad that was with the American Legion there in the hospital; he had been to France and was there for convalescence and recuperation and we met him while my sister was ill in that hospital.

Q. You had been acquainted with him before coming here? A. Yes.

Q. While you were at Kelly's was he there?

A. Yes, he was.

Q. Was that your reason for writing to ask what he knew about the case?

Mr. RAY.—We object to that.

Objection overruled; defendants except.

(By Mr. RAY.)

Mr. RAY.—I have another letter I want to call to the witness' [102—89] attention.

Q. I hand you a letter which I ask be marked Defendants' Exhibit No. 5 for identification (it is so marked) and ask you to state whether or not it is in your handwriting? A. It is.

Mr. RAY.—We offer the letter in evidence as a part of the cross-examination of this witness.

Mr. DUGGAN.—We object to it as immaterial.

The COURT.—The last part of the second page has some bearing on the case—that would be proper cross-examination. The jury will be instructed at this time that the only part of this which is admissible for any material purpose connected with

(Testimony of J. B. Beeson.)

this trial begins near the bottom of the second page, where I have marked a cross with a lead pencil.

The part of the letter admitted is marked Defendant's Exhibit 5 and read to the jury by Mr. Ray, as follows:

Defendants' Exhibit No. 5.

"Mildred says for you to go see Judge Truitt and tell him who you are. He's sure been fine to us and wants to see you about the trial. If you can 'remember' ever hearing Kelly say anything you tell him, see, for he needs one more witness besides us to substantiate our testimony. We want the state to win this case so we must all pull together.

How's Anchorage? Still a bad man's town? Is Kelly running full blast as before? etc."

Witness excused. [103—90]

Testimony of J. B. Beeson, for the Government.

J. B. BEESON, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. What is your name? A. J. B. Beeson.

Q. What is your business or occupation?

A. Physician and surgeon.

Q. In Anchorage? A. Yes, sir.

Q. Did you ever meet Mildred Hilkert?

A. I have.

Q. Where? A. At Mr. Kelly's place.

Q. Can you fix the time, Doctor?

(Testimony of J. B. Beeson.)

A. Not according to calendar, but it was very shortly after she came to Anchorage?

Q. What was the occasion of your visiting her?

A. It was a professional call—to see her; she was sick.

Q. Where was she?

A. She was in her room on the second floor, over Kelly's pool-hall.

Q. Was she in bed? A. She was.

Q. Was she sick? A. She was.

Q. Who, if anyone else, was there?

A. The other Hilkert girl and a man who I think was a taxi driver.

Q. Was there anyone there intoxicated?

A. Not in that room.

Q. Elsewhere?

A. I saw a man that was intoxicated as I passed through the room below. [104—91]

Cross-examination by Mr. RAY.

Q. Was this man intoxicated before he went into the pool-room or afterwards?

A. I have no way of knowing.

(By Mr. DUGGAN.)

Q. What were the conditions there?

A. What do you mean by that?

Q. In the pool-hall?

A. It was pretty well crowded,—there were a good many people in the room; I paid very little attention to that. I was shown upstairs to see this girl who was sick—there was nothing disorderly as far as I knew.

(Testimony of Ed Larocque.)

Q. Was there no one else in the room except this taxi driver?

A. Nobody but her sister and this other man that I think was a taxi driver.

Mr. RAY.—Do you know who called you?

A. Mr. Kelly.

Witness excused. [105—92]

Testimony of Ed Larocque, for the Government.

ED LAROCQUE, a witness called and sworn in behalf of the Government, testified as follows:

Direct Examination by Mr. DUGGAN.

Q. State your name? A. Ed Larocque.

Q. You know Ragtime Kelly? A. Yes, sir.

Q. Do you know Mrs. Kelly?

A. I have seen her.

Q. Were you in Kelly's place on or about the Friday or Saturday before Labor Day?

A. I was there on the third of September; it was Saturday.

Q. Did you see either Margaret Hilkert or Mildred Hilkert there?

Mr. RAY.—We object to that on the ground that it is too remote to show by any possible means any intent charged in the indictment.

Objection overruled; defendants allowed an exception.

A. Yes, sir.

Q. Did you have any conversation with the defendant Kelly? A. I did.

(Testimony of Ed Larocque.)

Q. What did he say in regard to Margaret Hilkert or Mildred Hilkert?

Mr. RAY.—We object to that.

Objection overruled; defendants except.

A. I asked Kelly if there was anything doing with Peggy and he said, "Sure," and I said, "I wouldn't mind staying with her all night"; "Well," he said, "I can fix it for you if you want to."

Mr. RAY.—We object to that and move to strike the answer.

Objection overruled and motion denied; defendants allowed an exception.

Q. Did you then talk to Peggy? [106—93]

A. I spoke to her afterwards.

Mr. RAY.—Answer yes or no.

The WITNESS.—Yes.

Q. What was said?

Mr. RAY.—We object to that.

Objection sustained.

Mr. DUGGAN.—That is all.

Cross-examination by Mr. RAY.

Q. What do you do for a living?

A. Blacksmith.

Q. Where are you working?

A. I worked for the Alaska Engineering Commission at Camp 285.

Q. How long have you been in Alaska?

A. About, pretty near two years.

Q. Where did you come from—before you came to Alaska? A. Seattle.

(Testimony of Ed Larocque.)

Q. Who was the first person to whom you repeated the remark you say Kelly made on September third?

A. I haven't repeated it, only once that I know of.

Q. To whom? A. Mr. Duggan.

Q. When? A. When I was in Seward.

Q. When?

A. I don't remember the exact date.

Q. Were you working on September third?

A. No, sir.

Q. How long had you been in town?

A. I came in on Friday the second of September.

Q. And this was the next day? A. Yes. [107—94]

Q. I don't presume you drink?

A. Certainly I drink.

Q. Were you drinking on the third day of September? A. Yes, sir.

Q. One or two drinks?

A. Several of them.

Q. Celebrating a little?

A. That was what I expected, came in for Labor Day.

Q. That is what you came in for? A. Yes, sir.

Q. How long had you been at 285, how long before your last relaxation?

A. Fourth of July.

Q. And on September third, Saturday, you came into Anchorage? A. The second.

(Testimony of Ed Larocque.)

Q. And on September third, Saturday, you had this conversation with Kelly? A. Yes, sir.

Q. Had you known Kelly?

A. I knew him, that is, I had been in his place lots of times.

Q. Had you visited these girls prior to September third? A. No.

Q. Had you been to their room? A. No, sir.

Q. You say the first man you spoke of this to was Mr. Duggan? A. Yes.

Q. At Seward? A. Yes.

Q. About what time was that?

A. I was working longshoring at that time—I don't remember exactly [108—95] what time it was.

Q. Was it last fall or this winter?

A. No, it was just this winter.

Q. How long before you came to Anchorage was this talk with Mr. Duggan?

A. I don't quite understand.

Q. How long before you came to Anchorage now did you talk to Mr. Duggan?

A. Why, I can't remember exactly but probably it might have been a week—it might have been less than that.

Q. When did you come to Anchorage?

A. Monday.

Q. This last Monday? A. A week ago.

Q. And how long before that did you talk to Mr. Duggan?

A. The day the boat was in, the "Victoria."

Q. About the seventh or eighth of February?

(Testimony of Ed Larocque.)

A. I don't remember the date.

Q. And was there anyone else you made the statement to? A. No.

Q. You haven't talked to these other men here, Mr. McCain or Mr. Hurley?

A. Mr. McCain was in the office but I didn't speak to him about it.

Q. And since your conversation with Mr. Duggan at Seward you haven't stated this testimony or made this statement?

A. No, I can't remember that I have before.

Q. Never discussed it with anyone?

A. No, sir.

Q. You now say that on September third this conversation took place? A. Yes, sir.

Q. Was there any friend with you down there at that time? [109—96]

A. Yes, I believe there was one.

Mr. DUGGAN.—From your own camp?

The WITNESS.—No.

Mr. DUGGAN.—The time has not been fixed.

Mr. RAY.—September third.

Q. Did you have a conversation with your friend on that day?

A. Why, I suppose I must have been talking to him.

Q. What did you talk about?

A. I can't remember exactly—we talked about most anything, like two friends.

Q. Do you remember any particular conversation? A. No.

(Testimony of Ed Larocque.)

Q. You say this conversation of Kelly's has not been called to your attention since, since you saw Mr. Duggan in Seward?

A. Well, I can't remember.

Q. Did anyone ask you if you had any conversation with Mr. Kelly on the third day of September?

A. No.

Q. You just went to Mr. Duggan and told him you had this conversation? A. Yes, sir.

Q. That's it, is it? Mr. Duggan didn't ask you?

A. This friend of mine, he asked me if I would come up.

Q. Who is this friend?

A. Who do you mean?

Q. Who is this friend of yours?

A. Mr. McNamara.

Q. Mr. McNamara told you if you were a witness in the case you could get a good bunch of money out of it? A. No.

Q. Did you tell McNamara you didn't know anything about the case? [110—97]

A. He knew I was in Kelly's place at that time.

Q. Did you say to him you didn't know anything about the case? A. No, I didn't say that.

Q. Did you say you didn't want to be a witness?

A. I don't like to be a witness.

Q. And didn't McNamara tell you you would get your mileage and Four dollars a day? A. No.

Q. Did McNamara tell you he could fix up a story for you to tell? A. No, sir.

Q. Were you ever in Valdez with McNamara too?

A. No.

(Testimony of Ed Larocque.)

Q. How long were you in Seward?

A. I left Anchorage in November—up until the time I left to come back.

Q. You were over in Seward all that time?

A. Yes, except one day I went to Resurrection River and went trapping for a while.

Q. Did you see McNamara when he came back through Seward from Valdez?

A. I seen him as he was getting off the boat.

Q. And have a talk with him there?

A. No, I didn't have much time because I was going down to look for a job.

Q. And did you see McNamara in Seward just before the first of the year? A. No, sir.

Q. Then you saw Mr. Duggan about the 7th or 8th of February when the "Victoria" arrived and Mr. Duggan got off the boat?

A. It was the "Victoria" came in.

Q. And were you served with a subpoena by the marshal? [111—98] A. Yes.

Q. On that day? A. No.

Q. When?

A. It was Saturday—the train left Monday.

Q. Now, have you seen Mr. McNamara since you have been in Anchorage?

A. I have been with him several times.

Q. And I don't presume you discussed this case at all? A. No, not to amount to anything.

Q. When did you quit your employment at Mile 285?

A. It must have been the last part of August some time.

(Testimony of Ed Larocque.)

Q. Did you work after you came in from your Labor Day celebration?

A. I worked longshoring and blacksmith-shop.

Q. You mean in Anchorage? A. Yes, sir.

Q. How much work have you done since, say, Labor Day?

A. I couldn't tell you exactly the amount of work I done—whenever there was work for me to do I did it.

Q. You got employment when you could?

A. Yes.

Q. How many conversations did you have with McNamara about this case?

A. I don't remember.

Q. You talked over the matter quite a little, didn't you? A. No, sir.

Q. Did you have more than one or two conversations? A. We might have had.

Q. Do you remember how many conversations you had? A. No, sir, not exactly.

Q. You can remember the exact language that was used on the third of September, but you don't know how many conversations you had with this man? A. Certainly.

Witness excused.

Government rests. [112—99]

DEFENSE.

Testimony of Frank Kelly, for Defendants.

FRANK KELLY, one of the defendants, sworn as a witness in his own behalf and in behalf of his codefendant Grace Kelly, testified as follows:

Direct Examination by Mr. COFFEY.

Q. State your name? A. Frank Kelly.

Q. You are known as Ragtime Kelly?

A. Yes, sir.

Q. You are a resident here of Anchorage?

A. Yes, sir.

Q. How long have you been in Anchorage?

A. I came here the 25th of January, about the 25th of January, with my show.

Q. 1921. A. Yes.

Q. How long have you been in Alaska?

A. Off and on for twenty-four years.

Q. Where was your first appearance in Alaska?

A. In Dawson City, 1898 and 99.

Q. What business were you engaged in there?

A. Theatrical business.

Q. How long were you in Dawson?

A. I went in there and stayed in there about a year; in the spring of 1900 I left for the Koyukuk on the steamboat and was about a year in the Koyukuk and then went to Nome.

Q. How long were you at Nome?

A. I landed in Nome, I think, it was the 6th or 7th, a few days after the 4th of July, and came out that fall, I think it was the very last of September or first of October, on the "Oregon."

(Testimony of Frank Kelly.)

Q. During the time of your residence in Alaska have you always [113—100] been engaged in the theatrical business?

A. In the Koyukuk I did a little prospecting; there was no theatrical business there and I went out prospecting on the Koyukuk.

Q. But generally during your residence in Alaska, what business have you been engaged in?

A. Theatrical business.

Q. Always in the theatrical business?

A. Always, all my life.

Q. You came here in January, 1921?

A. Yes. We opened at Ketchikan.

Q. What towns did your route include?

A. Ketchikan, Juneau, Seward, Cordovia, Anchorage, Eska and Chickaloon.

Q. Are you married? A. Yes, sir.

Q. How long have you been married?

A. Going on 20 years.

Q. Your codefendant, Mrs. Grace Kelly, is your wife? A. Yes.

Q. You have heard the testimony of the witnesses here that have been brought in by the Government—I will take up one or two of the matters brought out in their testimony: When you came here as a result of your tour along the coast, did you open up a pool-hall here in Anchorage?

A. Yes, sir.

Q. Where? A. At Robarts pool-hall.

Q. That is located on Fourth Avenue between F and G, City of Anchorage? A. Yes, sir. [114—101]

(Testimony of Frank Kelly.)

Q. Now, describe to the jury and Court that pool-hall so far as the downstairs arrangement is concerned?

A. Downstairs there is six pool-tables and a billiard-table.

Q. How long a building is it?

A. 140 feet long by 50 feet wide.

Q. You say there are six pool-tables?

A. Downstairs there are six pool-tables and one billiard-table; there are two bowling-alleys and there is a counter in the front and lined up with cigars and tobacco and cigarettes, and a back counter also with cigarettes.

Q. What part of the hall did the pool-tables occupy? A. They occupy the main floor.

Q. Is it on the right side of the main floor or the left side?

A. On the right side as you go in.

Q. And the left side—what is there?

A. That is the bowling-alley.

Q. That occupies about half?

A. No, the pool-tables occupy about two-thirds.

Q. How long were you engaged in the pool-hall business there before opening up a cabaret?

A. Took it about the first of March and it was about the first of August I got the idea of putting in a cabaret—I wouldn't swear positively when the idea first came to my head.

Q. Approximately, then, you were engaged in the pool-hall business about six months and went into the cabaret business about the first of August?

(Testimony of Frank Kelly.)

A. No, the cabaret didn't start, I don't think, on the first of August; the cabaret started around the fifteenth to the 20th of August.

Q. Now, in starting in the cabaret business, Mr. Kelly, did you consult any attorney here in the city regarding your rights [115—102] in the matter? A. I certainly did.

Q. Did you act upon that advice?

A. Absolutely on his advice.

Q. Was that advice of such a character as led you to believe you had a perfect right to enter into the cabaret business? A. Absolutely.

Q. And you entered into this cabaret business on that advice? A. Yes, sir.

Q. Now, along about the first or second of August, 1921, did you wire out to Seattle for two young ladies to come up here and to act as entertainers? A. Yes, sir.

Q. What were the names of those two young ladies?

A. Margaret Hilkert—there was some little controversy about her name—Margaret Hilkert and Mildred Hilkert.

Q. How did you know these two girls?

A. A gentleman by the name of Fred Waller—I had spoken about, had figured on a cabaret entertainment for the public, as there was nothing but moving pictures here, and I told him I thought it would be a good idea, as the people had no entertainment but pictures and he told me of a couple of friends of his in Seattle that were entertainers.

(Testimony of Frank Kelly.)

I told Fred, "It is just a little too early yet to bring them up here."

Q. Did he mention their names?

A. I think he did; I wouldn't swear positively.

Q. Were these the two young ladies you wired for? A. Yes, sir.

Q. Now, you have been engaged practically all your life in the theatrical business—is it customary, from your experience [116—103] as a theatrical man, is it customary to guarantee transportation expenses to prospective entertainers, with the understanding that they will return their transportation during the course of their entertainment?

Objected to as leading.

Mr. COFFEY.—I will change the form of that question.

Q. When you wired for these two Hilkert girls, did you so frame your wire that upon their accepting the terms of the contract of employment with you as entertainers, that they would return to you the amount of the fare advanced?

Mr. DUGGAN.—We object as calling for secondary evidence and not the best evidence.

Q. I now hand you Plaintiff's Exhibit "N" and ask you if you identify it? A. Yes, sir.

Q. Did you send that telegram?

A. I sent that myself.

Q. "Fred Waller just arrived in Anchorage and spoke to me about you and your sister wanting to come to Anchorage. Let me know at once your lowest salary for you and your sister per week to

(Testimony of Frank Kelly.)

work for me you play the piano and sing and sister help you also Will advance your transportation and you both pay five dollars per week till transportation is paid out Answer quick Fall and winter engagement." Did you send that telegram? A. I sent that myself.

Q. You sent that telegram?

A. The one you showed me? Yes.

Q. The one I just read? A. Yes.

Q. Upon the arrival here of these two young ladies, the Misses [117—104] Hilkert, did they proceed to fulfil their contract here to entertain in your pool-hall? Did they start to work as soon as they came here? A. The day after.

Q. Did you ever have any occasion to remonstrate with them regarding the character of their work, while they were employed with you?

A. Several occasions.

Q. Now, just state to the Court and jury the occasion of your first dispute with these young ladies and what led up to it.

The COURT.—I don't want to restrict you—you may ask when any dispute first arose regarding the manner of doing their work.

Q. Relate to the Court and jury any objectionable features regarding the work of these young ladies while in your employ.

A. The first time was about the third night they were there; it happened, as close as I can remember, around 9:30 or 10 in the evening. The big girl they called Mildred was in the corner, off the stand where the piano was, and was down on the further

(Testimony of Frank Kelly.)

left corner of the pool-hall—that was about 20 feet away from the piano, and she was dancing in a way that didn't appeal to me or would appeal to the customers that came into the place that were gentlemen. I called her aside and told her, "Mildred, I wouldn't do that, it just keeps people wanting to go and dance with you and you are not here to dance; you are here to sing and entertain," and she said to me, "What the hell are we in here, a church?" and I said "No, not exactly that, but I don't think it looks proper and you are just engaged to sing and entertain and that is all." She muttered under her breath and said, "Go to hell," and walked away.

Q. Was there anybody else there at this time overheard that conversation? [118—105]

A. Yes, there was another gentleman there.

Q. Who was it? A. His name is Miller.

Q. Ben B. Miller? A. Yes, sir.

Q. What was the next dispute you had with these young ladies?

A. The next dispute I had with them was—the little one had a continual habit—

Q. Whom do you refer to as the little one?

A. Peggy; she had a continual habit of always running upstairs, all the time, and staying up there 15 or 20 minutes at a time, and I spoke to her a couple of times about it, and she seemed to be very up-ish—

Mr. DUGGAN.—We want the conversation—what was said.

(Testimony of Frank Kelly.)

The WITNESS.—(Continuing.) She would continually run upstairs, every evening and stay up there 15 or 20 minutes at a time, instead of being down on the piano stand—in fact, I told her it would be best to stay on the piano stand all the time and that would stop encouraging people from wanting to go over to the piano stand and leave them alone, and she was a little inclined to be a little up-ish about it and didn't agree with me about it, and I didn't argue with the girl at all about the question except those statements that I made to her.

Q. When was the next dispute, if any?

A. The next dispute was the time about the clothes.

Q. What was that?

A. Well, they said they were going to quit and the big one was up there in the room. They called me up and Mildred said she couldn't stand the climate, that it was affecting her lungs and she did continually have a cold, all the time she was there, from the first day, and she said she was expecting [119—106] some money from Seattle, I am not positive but I think it was $100, and she said she and her sister were going to leave, and I said, "When do you expect this money?" and she said, "I am not sure whether I will get it or not," and I said, "Did you wire for it and do you want to go back to Seattle, you and your sister?" and she said, "Yes," and I said "I will tell you what I will do, Mildred; let me know the steamer you want

(Testimony of Frank Kelly.)
to go on and I will get you and your sister a ticket and you don't have to depend on the $100 whether it comes or not," and she hemmed and hawed a little and said, "We have kinder engaged a cabin and are going to live there and are not sure whether we will go out or not," and I said, "If you want to go, let me know and everything will be fixed. I will get you the tickets"; and I think it was the following day the expressman came to get the trunk and started upstairs, and I stopped him and said, "What are you going up there for?" and he said, "To get a trunk." I said, "Whose trunk?" and he said, "The two girls that work here," and I went upstairs and asked the girls if they were taking the trunks out and they said, "Yes," and I asked them if they had left the dresses, and they said, "No," they wanted the dresses, and I said they couldn't take them and they said they would go to Mr. Mossman and get them, and I told them to see Mossman and they went over there. A short while after that the phone rang and Mossman called me over and asked what the difficulty was and I said I didn't believe that there was any, that the girls had some dresses in the trunk that belong to my wife and I and they were taking them out. The girls said the dresses belonged to them and started to argue and if I am not mistaken, I think Mossman said, while I can't recall it exactly, that the only way to do was to see a couple of lawyers [120—107] to find out about the dresses.

(Testimony of Frank Kelly.)

Q. Now, in regard to those dresses—did you purchase those dresses with your own money?

A. My wife and I.

Q. That is, money taken from the Kelly poolroom was used to pay for those dresses?

A. Yes, sir.

Q. When they arrived there, the first night, previous to going to work, did you ask them regarding their clothes, whether or not they had clothes suitable for such an entertainment?

A. Yes, sir—and they said they had some dresses but they were not sure whether they would do or not.

Q. You heard the testimony of one of the young ladies, I think it was Peggy, that her trunks had arrived—how many trunks did she have?

A. I think there was only one.

Q. How big a trunk was it?

A. It was one of the small flat trunks.

Q. A steamer trunk? A. A steamer trunk.

Q. And upon learning that the clothes were not suitable for the kind of entertainment they were to give there, the cabaret, what did you do?

A. Well, I came downstairs and told my wife that I didn't think the dresses they had were bright enough to appear on the platform, to entertain.

Q. Did they say anything concerning the character of those dresses?

A. They mentioned the fact that they didn't think they would be good enough to wear.

Q. What did you do?

(Testimony of Frank Kelly.)

A. My wife said she would go up and look at the clothes. [121—108]

Q. Did she? A. Yes, sir.

Q. Then what became of the dispute with the Marshal's office regarding the disposition of the clothes?

A. A fellow named Jew Bob came in to my place that night and he said, "Kelly," he said, "do those girls owe you anything?"

Mr. DUGGAN.—We object to that—since we were not permitted to detail any transaction not in the presence of the defendants, we contend that any transaction with Jew Bob is not material in this case.

Objection sustained.

Q. Did you release the clothes or trunk?

A. Yes, sir.

Q. What became of the clothes or trunk?

A. They took the trunk with them.

Q. These young ladies? A. Yes, sir.

Q. You gave the clothes over to them?

A. Yes, sir.

Q. And they haven't been in your possession since? A. No, sir.

Q. During the time of their employment with you did you or Mrs. Kelly pay any money to them for services?

A. That I ain't positive about, just how much we did pay them, because after the third night they were there and after some reports I heard of

(Testimony of Frank Kelly.)

them downtown, after three o'clock in the morning—

Mr. MURPHY.—Never mind that.

The WITNESS.—I think my wife would know more about that than I would.

Q. You heard Miss Mildred Hilkert, the older of the two—you heard [122—109] her testify yesterday or the day before, regarding an incident that occurred at three o'clock in the morning, one hour after the young ladies testified they had quit for the evening, when they made an arrangement to go to Lake Spenard, and she testified it was dark?

Mr. DUGGAN.—We object to that, as leading and misstating the evidence.

Q. Well, at that hour of the morning, when she testified it was dark, was it dark?

A. Three o'clock in the morning?

Q. Yes—about the middle of August, 1921.

A. I wouldn't exactly call it dark.

Q. What would you call it?

A. I would call it light.

Q. Do you know a man by the name of Larocque, who testified here that he had a conversation with you regarding one of the young ladies?

A. Never in my life have I seen him.

Q. Was he ever in your place of business that you remember?

A. Never in my life do I remember seeing that man before.

(Testimony of Frank Kelly.)

Q. Did you have the conversation that he stated occurred between you and him?

A. Before my Almighty God, no.

Q. Your place is a public place, people of all kinds and characters come in there and frequent the place? A. Yes, sir.

Q. Is it customary for you to stand at your door at your place of business and inquire as to the character and habits of people that enter your place? A. No, sir.

Q. Now, Mr. Kelly, during the time of your entrance into this business [123—110] in March, up to and including the 5th day of September of that year, tell the jury and the Court the kind of place you were running there and the kind of people that frequented that place? The kind of people that frequented your place of business?

A. Well, I was running the pool-room and the bowling-alleys and the people that frequented the place I might say is people from all walks of life, the people of the town, business men a great deal.

Q. Did you ever hold any pool or billiard tournaments there?

A. We held a billiard tournament there and a bowling tournament.

Q. And people of various walks in life frequented that tournament? A. Yes, sir.

Q. Business men of the town?

A. Yes, more so than hardly anybody else, business men more than anybody else came to my place.

(Testimony of Frank Kelly.)

Q. Mr. Kelly, did you ever employ Miss Margaret Hilkert and Miss Mildred Hilkert, either or both of these young ladies, to come to Alaska for the purpose of indulging in the practice of prostitution or for the purpose of enticing them into a life of debauchery? A. How is that?

Q. Did you ever employ either or both Miss Mildred or Miss Margaret Hilkert to come to Alaska for the purpose of indulging in prostitution or the practices of debauchery? A. Certainly not.

Q. Or for any other immoral purpose?

A. No, sir.

Q. Did you ever furnish either or both of these young ladies with transportation from Seattle to place them in the position where they would become prostitutes? [124—111] A. No.

Q. Or might become immoral? A. No.

Q. Or might debauch themselves?

A. Certainly not.

Q. What was your purpose in employing the young ladies?

A. My main purpose in employing them was to give entertainment to the people of Anchorage, as there was no entertainment outside the moving pictures and I knew from being in the show business all my life and seeing none here that the people were hungry for some entertainment and that was my object in bringing them here.

Q. Were you in your pool-room shortly after the arrival of these young ladies when a young man by the name of Mickey O'Shea used some blas-

(Testimony of Frank Kelly.)

phemous language and your wife slapped him in the face?

Mr. DUGGAN.—We object to that as leading and suggestive and an attempt to state something not in the evidence.

The COURT.—I will sustain the objection as being leading and suggestive.

Mr. MURPHY.—I will withdraw the question.

Q. Were you present with Mrs Kelly and a person named Mickey O'Shea when an incident occurred in the pool-room? A. Yes, sir.

Q. What was the incident?

Mr. DUGGAN.—We object on the ground that it does not fix the time.

Q. Within a few day after the arrival of the young Misses Hilkert. Describe what that incident was?

A. I didn't quite hear what Mickey had said,—I was up at the other end of the counter and my wife was down at the end as you come [125—113] in and she slapped Mickey and I went down there and I asked her what was the trouble and she said that Mickey had used some language and I told him never to repeat language again in the place like that, and I said, "What did Mickey say?" and she said, "He apologized."

Q. Anything else?

A. That is all, I think of that.

Q. Do you know a man named McNamara?

A. Yes, sir.

Q. What are his initials, do you know?

(Testimony of Frank Kelly.)

A. I just know him by McNamara, that is all.

Q. Did you meet McNamara in Valdez?

A. Yes, sir.

Q. Did Mr. McNamara ever have a conversation with you regarding this case, in which the Government has charged you with being a white slaver?

A. Yes, sir.

Q. What was that conversation?

Mr. DUGGAN.—We object to that as incompetent, irrelevant and immaterial.

Q. Did McNamara ever state to you that for a consideration, financial consideration—

Mr. DUGGAN.—We object to any further statement of a question of this character, for the reason that Mr. McNamara is in nowise concerned in this case.

The COURT.—The objection will be sustained. So far as it appears from any evidence offered by the Government, Mr. McNamara does not represent the Government in any way at all and has not been employed by the Government. If McNamara were a Government agent, it would be different. The only way that Mr. McNamara gets into the case is through the cross-examination [126—113] of Mr. Larocque. Defendants will be allowed an exception.

Q. Mr. Kelly, did you lease, or what disposition did you make of the dance-hall upstairs, if any?

A. Why, we leased that out to some parties.

Q. To whom?

(Testimony of Frank Kelly.)

A. His name is—I can't think of it now; it is on the lease there.

Q. Was it to a William S. Elliott you leased it?

A. Yes, sir.

Q. I show you this paper and ask you if that is your signature and the signature as far as you know of William S. Elliott? A. Yes, sir.

Mr. COFFEY.—We offer this lease in evidence.

Mr. DUGGAN.—The offer is objected to for the reason that as far as it appears, it is not material to any issue or question in this case.

After argument—

By the COURT.—I think it is admissible but the weight of it will be for the jury. I believe the jury can give it such weight as it is entitled to, and it may possibly go to the intent.

Mr. RAY.—That is the only purpose for which it is offered.

The lease is admitted in evidence, marked Defendants' Exhibit No. 6 and read to the Jury by Mr. Coffey as follows:

Defendants' Exhibit No. 6.

"This agreement made this 3d day of August, 1921, between Frank Kelly, first party, and William S. Elliott, second party,

WITNESSETH: That first party leases to second party the use of Robarts Hall, now in possession of first party, for Saturday nights only, for the sum of Fifteen Dollars for each Sat-

urday night until the 1st day of February, 1922, from date.

It is agreed that one month's rental, being for the Saturday nights during January, 1922, shall be paid in advance, receipt whereof is hereby acknowledged.

It is further agreed that first party shall heat said building on said Saturday nights, furnish the light therefor and sweep the floors on said hall.

It is further agreed that should a general holiday fall upon any Saturday night during the term of this contract this agreement shall not apply to said night, and the right of second party to [127—114] the use of said hall upon such night shall depend upon a special agreement between the parties hereto.

It is further agreed that such hall shall be used for respectable dances and entertainments only.

FRANK RAGTIME KELLY.
WM. S. ELLIOTT.

Territory of Alaska,
City of Anchorage,—ss.

This is to certify that on this 3d day of August, 1921, before me, a Notary Public for the Territory of Alaska, personally appeared Frank Kelly and William S. Elliott, to me personally known to be the parties who signed and executed the above and foregoing contract, and each for himself and not one for the other acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

(Testimony of Frank Kelly.)

Given under my hand and notarial seal this 3d day of August, 1921.

SHERMAN DUGGAN,
Notary Public for Alaska.

My commission expires 10–31–1923."

Q. You entered into that lease, did you?

A. Yes, sir.

Q. It was signed by you and by Mr. William S. Elliott? A. Yes, sir.

Q. Did Mr. Elliott ever make any complaint to you during the course of these Saturday evening dances regarding the Misses Hilkert, Miss Mildred and Miss Margaret? A. Yes, sir.

Q. What was the nature of that complaint?

A. He told me one Saturday night that he saw one of the girls—the dance-hall is on the same floor as their apartments, and he said he saw one of the girls bringing men from the dance-hall floor and sitting down in their room and it didn't look nice.

Mr. DUGGAN.—We object to that and move to strike the answer.

The COURT.—The objection will be sustained and motion granted—you can bring Mr. Elliott in to testify to that. [128—115]

Defendants allowed an exception to the ruling.

Q. There was a complaint made by Mr. Elliott?

A. Yes, sir.

Mr. DUGGAN.—We make the same objection and motion.

Mr. RAY.—We think we have a right to show

(Testimony of Frank Kelly.)

what action, if any, was taken by Mr. Kelly in reply to this complaint.

The COURT.—This is purely hearsay. Mr. Elliott can be heard. It is permissible for the witness to state what caused him to do certain things but you are now asking him to say what somebody else told him.

Mr. COFFEY.—I will ask this question—

Q. Were any complaints made by Mr. William S. Elliott, the lessee of this dance-hall in the upper floor of your pool-room building? A. Yes, sir.

Q. How many entrances are there to your place on Fourth Avenue? A. To the pool-room itself?

Q. No, to your whole place? A. Two.

Q. Describe those entrances.

A. Well, into the pool-room there is a big double door and into the apartments upstairs there is a door, about this size (indicating a door in the court-room).

Q. What is the condition of that door as to being locked or unlocked? A. We keep it locked.

Q. Always? A. Yes, sir.

Q. How big a floor is the dance-hall upstairs?

A. I am not sure—I think it would be about 50 by 80.

Q. Eighty feet in length? [129—116]

A. Yes, sir.

Q. That would mean that there would be a distance of 80 feet between the apartments on the north end of the building to your living quarters on the south end?

(Testimony of Frank Kelly.)

A. There would be more than that—I am speaking of the dance-hall proper.

Q. What would be the distance between the two apartments on the north to the south end?

A. There would be a distance between the doors of 120 feet.

Q. How many apartments are there in the north end of the building on the Fourth Street end?

A. On the Fourth Street end there is one apartment—there is an apartment of a room, a kitchen, pantry and then a side room.

Q. How many rooms are there up there?

A. There would be three rooms.

Q. Do you know Mr. Ben B. Miller?

A. Yes, sir.

Q. Was he in your employ during the month of August and the early part of September, 1921, or approximately during that time?

A. I can't say whether he was; he was in there quite a lot playing billiards and pool. He is very fond of billiards and pool.

Q. Now just tell the jury and Court what kind of rooms they were on the Fourth Street end of the building.

A. The front part of the building, there is a big room, you would call it a living-room, and leading off of that is a little kitchen with cooking utensils and stove and sink in it. Off the big living-room in that direction (indicating) is another room.

Q. Did you employ a janitor? A. Yes, sir.

Q. Where did he live in the building?

A. In a small room.

(Testimony of Frank Kelly.)

Q. In the front part of the building? [130—117]

A. Yes, sir.

Q. Did I understand you to say that there were one or two rooms up there in the front part?

A. There is three rooms altogether in the front.

Q. Now, just give the jury an idea as to the furniture of the main room there, the big room you spoke of.

A. There is a big dining-table and there is what you would call a dresser and about four chairs and one bed.

Q. What kind of a bed, single or double?

A. One double bed.

Q. What kind of a stove, if any, in the little kitchen? A. A regular range.

Q. Was that room fixed up for housekeeping?

A. Yes, sir.

Q. Your apartments on the other end of the building were approximately how far away?

A. About 120 feet—it would be about 120 feet from the front door back to our house.

Q. How were your apartments arranged back there?

A. My wife and I have a dining-room, a bedroom, a bathroom and a stove.

Q. Was your place such a place as would permit of the frequent visitation by dissolute characters, drunken people, disorderly unmoral people?

Mr. DUGGAN.—We object to that as calling for a conclusion.

The COURT.—The objection will be sustained; he can describe the building.

(Testimony of Frank Kelly.)

Q. Were there any cribs upstairs in your place, Mr. Kelly—do you know what is meant by a crib?

A. Yes.

Q. Any such place as that upstairs? [131—118]

A. No.

Q. Was it so arranged that there could be promiscuous meeting on the part of male and female up there?

A. Never allowed a soul to go up there.

Q. Did you ever observe men going upstairs to visit these rooms?

A. The only party that I ever saw was a man by the name of Jack Williams and when he came down I called him and fired the drummer for going up there one night.

Q. It wasn't customary for you to see men frequenting the rooms upstairs going back and forth—you didn't see them?

A. No, I never allowed any.

Mr. COFFEY.—That is all just now.

Cross-examination by Mr. DUGGAN.

Q. You spoke of consulting an attorney about your cabaret? A. Yes, sir.

Q. Who was that attorney?

Mr. RAY.—We object to the question.

The COURT.—In questioning one juror you mentioned Mr. Duggan's name, before the trial began, but leaving that out of it, the question was asked a while ago if they did employ an attorney. The objection will be overruled and exception allowed.

(Testimony of Frank Kelly.)

A. Yourself, Mr. Duggan.

Q. When was that?

A. That was around the time of the Girdwood excitement, when I was getting out those powers of attorney.

Q. Fix the date—was it before August 20th?

A. Oh, yes, quite a while.

Q. Before the 20th of August? A. Yes, sir.

Q. How long before? [132—119]

A. If we can trace the Girdwood excitement we have it. I don't know the date.

Q. Did you not state on direct examination a moment ago that you first conceived the idea of the cabaret about the 20th of August?

A. No, I said this—I said that it was around the first of August; I was asked about that and said it was around the first I was bringing somebody up—it wasn't the first time I conceived the idea of starting the cabaret; I conceived that idea when I was in the house only three months—I figured it was quiet in the summer, and the cabaret would run in the fall, when the people were in town,—that would be the time to run the cabaret as the people would be looking for amusement.

Q. Did you ever consult me regarding the white slave law? A. No, I did not.

Q. As a matter of fact, Mr. Kelly, you never consulted me about the cabaret, did you?

A. Mr. Duggan, I beg your pardon—

Mr. RAY.—We object; a confidential communication between attorney and client cannot be introduced in this manner.

The COURT.—A defendant is always, within reasonable limits, permitted to testify as to the motives that moved him, and Mr. Kelly is within reasonable limits permitted to tell the motives that governed him. He was entitled to say and indicate by the evidence that he did consult an attorney and that he did not want to do anything that would violate the law.

Mr. DUGGAN.—It seems to us when he testified that he received legal advice upon a proposition and that he acted upon it, or at least that was the inference from the statement, that opens up the matter. There is nothing to show what kind of counsel he got—we contend that after he has taken the position that [133—120] he acted upon advice of counsel, that we can show what kind of advice he got. I will ask this question for the purpose of a ruling, if I will be permitted to take the stand on rebuttal and testify—

The COURT.—I will take this question under advisement and you may recall Mr. Kelly to-morrow. I think the rule is when a client testifies to a conversation he has had with an attorney, asking his advice, that he removes the secrecy—it no longer becomes a confidential communication and he waives the right to claim it was a confidential communication, but as to how far that goes, I would like to look the matter up. We will reserve this matter until to-morrow and you may proceed with other matters, Mr. Duggan.

Q. Were you convicted of violating the bone dry law?

(Testimony of Mrs. Grace Kelly.)

Mr. RAY.—We object to that and ask that the jury be instructed that where a man is convicted in the Justice's Court and appeals that it stands as no conviction.

The COURT.—The objection will be sustained if it refers to a conviction in the Justice's Court that is pending on appeal—the appeal vacates the judgment.

Mr. DUGGAN.—We ask for an exception.

Government allowed an exception.

Mr. DUGGAN.—That is all.

Mr. RAY.—It is understood we can recall Mr. Kelly in the morning?

The COURT.—Yes, sir.

Witness excused. [134—121]

Testimony of Mrs. Grace Kelly, for Defendants.

MRS. GRACE KELLY, one of the defendants, called and sworn as a witness in her own behalf and in behalf of her codefendant Frank Kelly, testified as follows:

Direct Examination by Mr. COFFEY.

Q. What is your name? A. Grace Kelly.

Q. You are the wife of Frank Kelly, known as Ragtime Kelly? A. Yes, sir.

Q. How long have you been married, Mrs. Kelly?

A. Twenty years, the 14th of March.

Q. During the period of your married life what business have you been engaged in?

A. Theatrical business.

Q. What kind of theatrical business?

(Testimony of Mrs. Grace Kelly.)

A. Vaudeville and musical comedy.

Q. When did you first come to Alaska?

A. Around Christmas-time, the week of Christmas, we landed in Ketchikan.

Q. Where did you go from there?

A. Juneau.

Q. And from there along the coast?

A. Yes, sir.

Q. What time did you arrive in Anchorage?

A. It was about the middle of January, 1921.

Q. And you have remained in Anchorage since January, 1921?

A. Yes, with the exception of one time I went out, last fall.

Q. You have been engaged with Frank Kelly in the operation of the Kelly pool-rooms located on Fourth Avenue in this city? A. Yes, sir.

Q. What were your duties there, what did you do?

A. Aside from my housework, I helped with all the duties that were [135—122] necessary.

Q. You lived on the premises? A. Yes, sir.

Q. Where?

A. In our apartment, in the back of the building, upstairs—at the rear end of the dance hall.

Q. Would your duties call you to assist in the downstairs part of the building such as the pool-room and the bar?

A. Yes, sir. I waited on the counter; when there was no one there I took care of the pool-tables.

(Testimony of Mrs. Grace Kelly.)

Q. So you were there practically all the day and evening? A. At all times.

Q. At all times in the building? A. Yes, sir.

Q. Do you know the Misses Hilkert?

A. Yes, sir.

Q. Were they employed at your place during the month of August and the early part of September, 1921. A. Yes, sir.

Q. What were their duties?

A. They were employed as entertainers.

Q. When did they start their employment there?

A. They went to work the 20th of August, 1921.

Q. What was the nature of their entertainment?

A. They were supposed to sing and play the piano.

Q. And they did that? A. Yes, sir.

Q. Now, on their arrival here about the middle of August, did you have occasion to have a talk with them concerning their wardrobe?

A. Yes, sir.

Q. State what that was. [136—123]

A. The morning after their arrival, the matter of their wardrobe came up. Mr. Kelly spoke to them first about it and asked them what they had to wear, and I don't know just what his conversation with them was, but he told me to go up and look at the girls' dresses, which I did. I went up and found two organdie dresses and the girls, we all three, agreed that they were not suitable for them to wear, and I told them it would be a good idea for them to go downtown and try to find something and as to the matter of payment, we

(Testimony of Mrs. Grace Kelly.)

would look after that; and they went down and said they couldn't find anything,—they didn't know what to get. They came back and I said, "I will go with you," which I did—I went down to Miss O'Bryan's and decided on a dress there for Mildred.

Q. What kind of a dress was that?

A. It was a black dress, entirely black, low neck, short sleeves,—in fact, a regular evening gown.

Q. Was it an extreme dress?

A. Not at all—it was just an evening gown.

Q. Did they purchase that dress?

A. I bought that dress and paid cash for it at the time—besides that I bought two pair of slippers for each, there.

Q. What did you do then?

A. After that we went to Dougherty's.

Q. You couldn't find anything for the younger girl at Miss O'Bryan's?

A. No, there was nothing there we thought was suitable, and we went to Dougherty's from there and looked over some gowns and found one, light green in color, that they thought was very pretty. Peggy liked it very much—I mean the one called Margaret—and we finally decided on that. It had to be altered a little which was done that afternoon, so she could wear it [137—124] that evening, as they were to open their engagemet that evening; besides that I believe they got some hosiery for that evening.

Q. Were any other materials purchased for them any other place? A. No.

(Testimony of Mrs. Grace Kelly.)

Q. They didn't visit any other stores in town?

A. Not then.

Q. Did they later, for the purpose of purchasing dresses?

A. Well, they went down to Mrs. Ashton's.

Q. When was this?

A. I am a little ahead—from Miss O'Bryan's we went to Mrs. Ashton's to see if we could find something suitable for Peggy.

Q. Did you find anything there?

A. No—there was what I thought was a very pretty dress which had been worn on the 4th of July by one of Mrs. Ashton's salesladies.

Q. What was her name?

A. Miss Maude Osborne—it had been worn in the patriotic window; two young ladies appeared there in the window that Mrs. Ashton had fixed up and Miss Osborne wore this gown.

Q. At the time this dress was being examined or arrangements for its purchase being made, was anything said by anybody in your presence or in the presence of Mrs. Ashton, or either one of them, that the dress had been worn by one of the prostitutes from the line?

A. No, that remark was not made—she thought it was soiled.

Q. She said it was soiled?

A. She said the dress looked as though it had been worn and Miss Osborne, who was waiting on us, said, "Yes, I wore this dress on the 4th of July in the window for two or three hours," I think she said. [138—125]

(Testimony of Mrs. Grace Kelly.)

Q. Miss Osborne was a clerk at the time in Mrs. Ashton's store? A. Yes, sir.

Q. I hand you a piece of paper and ask you if you ever saw it before and if so, what is it. (Handing witness paper.)

A. This is a duplicate bill which I got the other day from Mrs. Dougherty up here, the other bill having been lost in the courtroom, I think, which shows the amount of the goods I bought and which Mr. Kelly paid for by check.

Mr. COFFEY.—We offer the bill in evidence.

Mr. DUGGAN.—We object to it; it does not appear that she knows anything about the correctness of this account. The party who made the bill is the proper party to testify to it and for the further reason that the bill is addressed to Mrs. Frank Kelly and under it the word "Ragtime" —it doesn't appear to be anything concerning the girls.

The COURT.—The bill itself is not admissible.

Q. On or about the 19th or 20th of August, 1921, did you purchase anything at Dougherty's store in the city of Anchorage for Miss Mildred Hilkert or Miss Margaret Hilkert, and if so what?

A. I purchased a dress, some hosiery, a brasssiere and a corset—I believe that is all that day.

Q. What, if anything, on a later date did you purchase?

A. They went in and bought two hats, which were also put on the bill.

Q. Do you remember how much those hats cost?

A. $12.50 each I think.

(Testimony of Mrs. Grace Kelly.)

Q. Did you pay for them?

A. They were paid for by check, by Mr. Kelly.

Q. Anything else at that or a later date?

A. I don't recall. [139—126]

Q. Then your purchases on the 19th of August, 1921, amounted to a dress, some hosiery, a corset, a brassiere and two hats—is that correct?

A. Yes, sir.

Q. Those were paid for, were they?

A. Yes, sir.

Q. Now, Mrs. Kelly, do you know Mickey O'Shea? A. Yes, sir.

Q. Did you ever have any trouble with Mickey O'Shea or an argument of any kind in your place of business? A. Yes, sir.

Q. State what that was and approximately the date of it.

Mr. HURLEY.—We object to that as incompetent, irrelevant and immaterial, unless it is shown it is connected with either Mildred or Margaret Hilkert.

The COURT.—It is admissible as showing the character of the house.

Q. What was that—tell the Court and jury what that argument was.

A. Mickey O'Shea was standing at the end of the counter one evening and he used some very improper language, language which I never permit in my presence if I can avoid it. I spoke to him about it and he didn't pay any attention to me and I slapped him in the face twice as hard as I

(Testimony of Mrs. Grace Kelly.)

could and he thanked me and said he didn't blame me.

Q. What time of day or evening was this?

A. This was, I should judge, about 11 o'clock in the night, after the girls had left.

Q. There was quite a crowd in the place?

A. Yes, sir; there was quite a crowd in the place.

Q. Do you know of your own knowledge whether or not Mickey O'Shea ever had any discussion of any kind with these girls the [140—127] Misses Hilkert? A. No.

Q. Now, Mrs. Kelly, you were in and out of the building all of the time, upstairs part of the time attending to your household duties and downstairs considerable of the time. What was the character of the people who would frequent your place of business during the course of the day and evening?

A. Being a public place people of almost all characters came in and out.

Q. Did you see business men in there?

A. Plenty of them.

Q. What would they be doing?

A. Oftentimes to play a game of pool or bowl or buy a cigar or stand around and converse and meet their friends there.

Q. On or about the first day of August did you know of Mr. Kelly's intention of employing two young ladies from the outside to come in and act as entertainers? A. Yes, sir.

Q. They were the Misses Hilkert?

(Testimony of Mrs. Grace Kelly.)

A. Yes, sir, they were.

Q. Do you know how they happened to be selected for this employment?

A. Through Mr. Waller.

Q. What did he say?

A. Mr. Waller had been outside and came back—

Q. That is Mr. Fred Waller?

A. That is Mr. Fred Waller—

Mr. DUGGAN.—We object to the question on the ground that it is immaterial, as it does not go to the question of intent and is hearsay because Mr. Waller could be called in to testify to the fact, if it is a fact. [141—128]

The COURT.—Objection overruled; it is material for any weight it might carry to show the intent.

Q. Who, if anybody, recommended these young ladies to you? A. Mr. Waller.

Q. Did you ever know these young ladies before?

A. No, sir.

Q. Was anything ever done in the Kelly pool-hall during the time these young ladies were there or afterwards or before which would tend in any way, shape, manner or form to debauch their moral character?

A. Absolutely nothing, not to my knowledge.

Q. Did you have any intent, in any way, shape, form or manner of using these girls for purposes of prostitution upon their arrival here.

A. No, sir.

(Testimony of Mrs. Grace Kelly.)

Q. On the contrary, did you do all you could to protect them? A. Yes, sir.

Q. Did you do anything that would lead them into such a course? A. No, sir.

Q. Now, when Fred Waller recommended these young ladies as entertainers, what, if anything, did he say to you, so as to put you on your notice that they were entertainers and not simply some stray characters that might be working around Seattle?

Mr. DUGGAN.—We object to that as hearsay.

Objection sustained; defendants except.

Q. Mrs Kelly, you heard the testimony here of Margaret Hilkert, Peggy, in which she testified that you and Mr. Kelly had arranged a party to go out to Lake Spenard,—is that correct?

A. No, sir.

Q. Did you ever arrange such a party? A. No. [142—129]

Q. How did you happen to go on such party?

A. After we closed up, we went down to the Frisco for lunch. While we were there, there was a party that the girls were with—there were four of them in there, two girls and two gentlemen, in a box. One of the boys saw us out there or heard us and came out and invited us in and while we were there, the matter of the trip out to the Lake came up. I didn't want to go,—I didn't care to go on night rides, but they finally prevailed on me to go and we went out on this trip, the six of us.

Q. What time did you return to Anchorage?

A. Around six o'clock in the morning.

(Testimony of Mrs. Grace Kelly.)

Q. Was it dark or daylight? A. Daylight.

Q. Broad daylight? A. Broad daylight.

Q. This was along about the middle of August?

A. Yes, sir.

Q. Nothing unusual about being daylight that hour? A. No, sir.

Q. What time did you go out there?

A. It was about 3:30; I think they said it was four o'clock when they were out there bathing, and I remarked about its being so light and being able to go in swimming that time in the morning.

Q. Have you done anything while a partner of your husband's up there in this pool-room business or being associated with him—have you done anything which would in any way cause a virtuous young lady to be ashamed of her employment up there?

A. Not anything that I ever knew of.

Q. Has the place ever been conducted to your knowledge during the time you have been there in a way that would lead a virtuous young lady to practices of immorality or debauchery? [143—130]

A. No.

Q. Was there any intent on your part when you, with the assistance of your husband, engaged the services of these two young ladies, the Misses Hilkert, to come here to be employed in your place, to use them for purposes of prostitution?

A. Absolutely not.

Mr. COFFEY.—That is all.

(Testimony of Mrs. Rose McFarland.)

Mr. DUGGAN.—We have no cross-examination.

Witness excused.

Whereupon court adjourned until to-morrow (Friday, February 24, 1922), at the hour of ten o'clock A. M. [144—131]

Friday, February 24, 1922.

MORNING SESSION.

Testimony of Mrs. Rose McFarland, for Defendants.

MRS. ROSE McFARLAND, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. Please state your name?

A. Rose McFarland.

Q. You are a resident of Anchorage?

A. Yes, sir.

Q. You know the defendants, Frank and Grace Kelly? A. Yes, sir.

Q. Were you ever in their employ?

A. Yes, sir.

Q. About what time?

A. I went to work for them the 9th day of March and worked until the 13th day of May, I believe; two months.

Q. Last year, 1921? A. Yes, sir.

Q. What were your duties while you were employed there?

A. Well, just working in the cigar part of the

(Testimony of Mrs. Rose McFarland.)

place, cigars and soft drinks; I also assisted Mrs. Kelly in the household duties.

Q. Did you reside there? A. Yes, sir.

Q. Lived there? A. Yes, sir.

Q. Where were your apartments?

A. When I first went to work for them I lived at the Alaskan Hotel and later moved up in the apartments with Mr. and Mrs. Kelly and later had a room in the front part vacated that I took.

Q. That is on the Fourth Street end of the building, on the second floor? [145—132]

A. Yes, sir.

Q. Do you know Miss Mildred Hilkert and Miss Margaret Hilkert? A. I do.

Q. Did you ever meet them during the month of August and September?

A. Yes, I met the girls.

Q. Where? A. At my own hotel.

Q. When? Can you fix the date approximately?

A. No, I can't.

Q. Was it some time during the month of August, last year? A. I believe it was, yes.

Q. Where did you meet them?

A. At my house, at my hotel.

Mr. DUGGAN.—The Government objects to any further inquiry in this matter, as it now appears that this is an incident that took place outside of the Kelly pool-hall and on the objection of the defendants the evidence of anything that took place outside of the pool-hall was ruled out in the

(Testimony of Mrs. Rose McFarland.)

Government's case, and it is immaterial to this case.

The COURT.—The objection will be sustained—there has been no foundation laid for this testimony.

Defendants allowed an exception to the ruling.

Q. During the time of your employment at the Kelly pool-room, Mrs. McFarland, what was the moral condition, if you know?

Mr. HURLEY.—We object as incompetent and immaterial—it is not shown she was there at the time the girls were there.

The COURT.—She may answer.

A. It could not be better.

Q. While you were in the employ of the Kellys, either of them, were you ever asked to engage in the practice of [146—133] prostitution of any kind or character?

Mr. HURLEY.—We object as incompetent, irrelevant and immaterial.

Objection sustained; defendants except.

Q. What kind of people, if you know, frequented the Kelly pool-hall during the time of your employment there?

A. Just people of the town.

Q. Business people? A. Yes.

Q. Did you ever have any trouble of any kind or character with the Kellys while you were employed with them?

Mr. HURLEY.—Same objection.

Objection sustained; defendants except.

(Testimony of Mildred Hilkert.)

Mr. COFFEY.—At this time I wish to withdraw the witness now on the stand and call Miss Mildred Hilkert for further cross-examination.

The COURT.—You may do so.

Witness withdrawn.

Testimony of Mildred Hilkert, for Defendants (Recalled—Cross-examination).

MILDRED HILKERT, recalled for further cross-examination.

(By Mr. COFFEY.)

Q. Miss Hilkert, during the month of August, 1921, did you ever have a conversation at the Alaskan Hotel with Mrs. Rose McFarland?

Mr. DUGGAN.—We object as not proper cross-examination.

Objection overruled; exception allowed.

A. Yes.

Q. While there were present your sister and Mrs. McFarland and one or two others?

A. Yes, I had some conversation with Mrs McFarland, twice.

Q. At the Alaskan Hotel? [147—134]

A. Yes.

Q. Did you at the time stated by you in this conversation with Mrs. Rose McFarland state in effect that you were perfectly satisfied where you were, at Kelly's, that you could make more money but that Kellys wouldn't permit you to do the things you wanted to do and that the reason you didn't go down the line at the request of your escort and others there that you had figured on quit-

(Testimony of Mildred Hilkert.)

ting the Kellys and opening up uptown—did you ever have such a conversation?

A. That is not true.

Q. Now, at one of these conversations had at the Alaskan Hotel with Mrs. McFarland, present your sister and others, if you know them, we don't—didn't you state to her, Mrs. McFarland, that there was some woman here in town wanted to get the Kellys and you would like Mrs. McFarland to go on the stand and testify that she had been solicited by either or both of the Kellys to engage in the practices of prostitution?

The COURT.—When was this?

Mr. COFFEY.—At one of the two conversations she has identified.

Q. You testified you had two conversations?

A. Yes.

Q. When was the first conversation?

A. The Sunday night before Labor Day.

Q. When was the next?

A. Three days before I left for Valdez to go to the grand jury.

Q. At either of these times, did you state to Mrs. McFarland that there was some woman here in town that wanted to get the Kellys and ask Mrs. McFarland if she would go on the stand and testify that she had been solicited while in the employ of the Kellys to engage in the practice of prostitution?

A. The question was not of that kind. Somebody had told me that [148—135] Mrs. McFarland

(Testimony of Mildred Hilkert.)

herself had trouble with the Kellys and the first time I was over there, she told me about the trouble and how much she disliked Mr. Kelly and a man present spoke up in Mrs. Kelly's defense. At that time she was very bitter, and the next time she spoke about everything else but refused to have anything to do with it.

Q. You didn't have that conversation?

A. No—she refused to say anything more about it.

Q. Those were the only two conversations you had?

A. That is all relating to that, yes, sir, that is all the conversation, but I saw her on the street once—she was always very nice to me.

(By Mr. DUGGAN.)

Q. Did you ever ask Mrs. McFarland to testify to anything that wasn't true? A. No.

Q. Did you ever ask anyone to testify in this case to anything which wasn't true?

Mr. RAY.—We object to that.

Objection sustained.

Q. Did you ask Mrs. McFarland to testify in this case at all?

A. I didn't ask her to testify. When the conversation with Mrs. McFarland took place it was before anything had been done by the Government whatever—it was the time Mr. Kelly had been sending his lawyer to us, trying to force us, under a misappropriation of funds—

(Testimony of Mrs. Rose McFarland.)

The COURT.—Never mind that. Tell about Mrs. McFarland.

The WITNESS.—There was nothing relating to this case whatever.

Witness excused. [149—136]

Testimony of Mrs. Rose McFarland, for Defendants (Recalled).

MRS. ROSE McFARLAND, recalled.

Continuation of Direct Examination by Mr. COFFEY.

Q. Has the Assistant United States Attorney just been talking to you? A. No.

Q. You haven't had any talk within the last ten minutes with any member of the District Attorney's staff? A. No.

Q. Did you ever have any conversation with Miss Mildred Hilkert at the Alaskan House, during the middle of the month of August, 1921?

A. Yes, sir.

Q. State what that conversation was?

A. The conversation was—

Mr. HURLEY.—We object unless it is shown who was present at the time.

Mr. COFFEY.—State who was present.

A. Her sister was present and another young lady.

Q. That is Peggy?

A. Yes, sir, and the other, I don't remember her name, and a gentleman named Mr. Rich and the

(Testimony of Mrs. Rose McFarland.)

two boys here—Gordon and Wesley—I don't remember their surnames.

Q. What was said by Mrs. Bowles, or Miss Mildred Hilkert?

A. She told me that she had another woman who had come to her and said they wanted to job the Kellys and said that they had it in for them and wanted to get them out of business and wanted to get them out of town, and asked if I would go on the stand and say that the Kellys had asked me to rustle when I worked for them, and I replied that I would absolutely refuse to do it.

Q. Was it true what they intimated in their request? [150—137] A. No, sir.

Mr. DUGGAN.—We object and move to strike the answer.

Objection sustained and motion granted; defendants except.

Q. Did you have any further conversation with Mrs. Bowles? A. Yes, sir.

Q. State what that conversation was?

The COURT.—Who was present?

A. The same parties were present.

Q. What time was it?

A. I judge it was about, some place near eleven o'clock at night.

Q. What time of the month and year?

A. It was in September, I believe.

Q. State what the conversation was.

A. Mildred asked to have rooms at my place—

(Testimony of Mrs. Rose McFarland.)

Q. That is the Alaskan Hotel?

A. Yes. She said they had a cabin and they were being hounded and had been raided and made to get out.

Q. Get out of where? A. Out of the cabin.

Q. Did you rent them any rooms? A. No, sir.

Q. Why?

Mr. HURLEY.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—This conversation you are asking about now isn't the one you asked Mrs. Bowles about. That will be stricken from the record; you can only have Mrs. McFarland testify on impeachment as to the statements you asked Mrs. Bowles about.

Mr. COFFEY.—Then I will ask permission to recall Mrs. Bowles.

The COURT.—Very well.

Witness excused. [151—138]

Testimony of Mrs. Bowles, for Defendants (Recalled—Cross-examination).

MRS. BOWLES, recalled, for further cross-examination, by Mr. COFFEY.

Q. Mrs. Bowles, did you at the Alaska House, at Anchorage, Alaska, about the middle of August, 1921, in the presence of your sister and others—in the presence of your sister, Virgil Rich, a man by the name of Wesley and a man named Gordon Gifford, ask Mrs. McFarland whether or not you could secure rooms there in the Alaskan House,

(Testimony of Mrs. Bowles.)

that you were being hounded around town, at your cabin, and that you were going to do what you wanted to do while you were at Kelly's—is that true or not?

A. That is not true. I did ask Mrs. McFarland if she would let my sister and I room there and she informed me that her house wasn't run for women she had no women staying there, that she catered to men only, and furthermore, that statement was not made in the middle of August; it was made in September, three weeks after we left Kelly's, and after our cabin had been raided several times and broken into and our trunks, and she was very nice to me and was a woman and I thought would let us into the house.

Q. You didn't have any conversation previous to that with Mrs. McFarland on this subject?

A. No, sir; I only saw Mrs. McFarland twice.

Witness excused. [152—139]

Testimony of Mrs. Rose McFarland, for Defendants (Recalled).

MRS. ROSE McFARLAND, recalled by Mr. COFFEY.

Q. Mrs. McFarland, did you in the presence of Miss Mildred Hilkert, her sister, known as Miss Margaret Hilkert, and a man named Wesley, and a man named Gordon Gifford, at the Alaskan House, in the latter part of August or first part of September, have a conversation with Miss Mildred Hilkert during which she asked you to secure rooms?

(Testimony of Mrs. Rose McFarland.)

Mr. DUGGAN.—We object.

Objection sustained; defendants except.

Q. Did you at this time designated have a conversation at the Alaskan Hotel? A. Yes, sir.

Q. State what that conversation was. The latter part of August or first part of September?

A. The same parties were present I spoke of before.

Q. Mention those names again?

A. Mr. Rich and Gordon and Wesley, I forget their surnames, and Margaret and this other young lady—I don't remember her name.

The COURT.—Gordon is Gordon Gifford?

A. Yes, sir; Gordon Gifford.

Q. What was the approximate date of that conversation? A. I really couldn't tell you.

Q. Approximately?

A. It was along in September, I think.

Q. Now, state what that conversation was, Mrs. McFarland?

A. In regard to her wanting the rooms?

Q. Yes.

A. She wanted to get rooms—I told you what she said about the cabin; she said they had a cabin and it had been raided and they had been ordered to get out and they couldn't find a place to live. She also said that they met plenty of men [153—140] with money but they had no place to take them.

Mr. DUGGAN.—We move that the last part of that answer be stricken.

(Testimony of Mrs. Rose McFarland.)

The COURT.—The motion will be granted because it wasn't put to the witness, Mrs. Bowles. Defendants except to ruling.

Q. Did they rent rooms there from you?

A. They did not.

Q. Did I understand you to say that you did rent the rooms to her? A. No, I did not.

Q. Why didn't you?

Mr. DUGGAN.—We object as incompetent.

The COURT.—Did you give any reason to her why you didn't rent?

A. Yes, I told Miss Hilkert I was running a bachelors' quarters—I didn't rent rooms to ladies.

Mr. COFFEY.—That is all.

Cross-examination by Mr. HURLEY.

Q. Mrs. McFarland, did you have a conversation with Mr. J. B. Larson at your place, at which you and Mr. Larson were present, about three weeks after the day Kelly was arrested, in which you told Mr. J. B. Larson in effect that the defendant Kelly told you that he had been handling sporting women for years and that he didn't want a couple of chippies to put anything over on him?

A. No, sir; I did not.

Q. At the same time and at the same place, the same parties present, did you say to Mr. Larson in effect that you didn't know anything that would help Kelly, referring to this case?

A. No, I did not.

(By Mr. RAY.)

Q. Do you know who J. B. Larson is? [154—141]

(Testimony of Mrs. Rose McFarland.)

A. The only Larson I know in the town is the man who owns the Empress grocery store.

Q. You know to whom they refer?

A. Well, I suppose it is this Larson—it is the only Larson that has ever been in my house, to my knowledge, and we have never had any conversations in regard to the Kellys.

Witness excused. [155—142]

Testimony of Mrs. Mabel Pierce, for Defendants.

MRS. MABEL PIERCE, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. What is your name? A. Mabel Pierce.

Q. You are a resident of Anchorage?

A. Yes, sir.

Q. You know the defendants, Frank Kelly and Mrs. Kelly? A. Yes, sir.

Q. How long have you known them?

A. A little over a year.

Q. Were you ever employed by either of them?

A. Yes, sir.

Q. In what capacity?

A. I was sewing at their place on several occasions, at their residence.

Q. Where is that? A. Over the pool-hall.

Q. That is at the south end of the pool-hall, in their living quarters? A. Yes, sir.

Q. Did you have occasion to note the character of the house, Mrs. Pierce, while you were employed there?

(Testimony of Mrs. Mabel Pierce.)

A. As far as I know it was very good.

Mr. DUGGAN.—We object as not responsive to the question.

Q. When were you employed there?

A. I don't know exactly the date.

Q. Approximately?

A. It was some time around June, I think, or around there somewhere.

Q. 1921? [156—143] A. Yes, sir.

Q. Last year? A. Yes, sir.

Q. Now, during the time of your employment there, were you familiar with the character of the people that entered the place?

Mr. DUGGAN.—The question should go to the pool-hall, not to the place—it should go to the place where these transactions are testified to having taken place; if it goes to the character of the defendants, we want to know it.

Objection overruled.

Q. What was the character of the people that frequented the place, if you know?

A. Very good.

Q. Did Mr. Kelly ever have a talk with you, Mrs. Pierce, regarding the employment of your daughter in his place of business?

Mr. DUGGAN.—We object to that as incompetent and immaterial.

Objection sustained; defendants allowed an exception to the ruling.

The COURT.—You can't prove reputation by individual instances.

Mr. RAY.—I want to make an offer not in the presence of the jury.

Mr. DUGGAN.—We insist he make his offer in writing.

WHEREUPON the jury was excused and retired from the room—

By Mr. RAY.—The defendants offer to prove by the testimony of the witness on the stand, upon the question of intent upon the part of the defendants on August 3, 1921, at the time they provided transportation for the prosecuting witnesses, if they did so provide the transportation, that the witness frequently visited the cabaret show with Mrs. Munson and husband and with Bill Jones; that the character of the performance did not indicate immorality, looseness or [157—144] debauchery and she would be willing to have her daughter work for the Kellys; that the young lady is dead and cannot now be produced as a witness.

The COURT.—It may all be admitted except the statement that she would be willing to have her daughter work for the Kellys. I can't see how that would have any bearing.

Mr. RAY.—We ask an exception to the ruling.

The COURT.—The testimony offered will be admitted except on that one point; that offer is rejected and the exception allowed.

WHEREUPON the jury returned and direct examination of Mrs. Pierce was continued by Mr. COFFEY.

Q. How long were you employed there at Kelly's, approximately?

(Testimony of Mrs. Mabel Pierce.)

A. Well, possibly two or three weeks—two weeks possibly.

Q. During that time did you have occasion to observe the character of the people that frequented the pool-room?

A. I have been through there many a time.

Q. When was that you were employed there?

A. I said some time, I thought, in June.

Q. 1921? A. Yes.

Q. During the time of your employment there, did you have occasion to observe or did you observe the character of the people that frequented the pool-room downstairs?

Mr. DUGGAN.—We object to that—it doesn't cover the period of time charged in the indictment or covered by the evidence.

Objection overruled.

A. Yes.

Q. What was the character, if you know?

A. Good. [158—145]

Q. Did you ever at any time that you were employed there see anything that would indicate the fact that the practice of prostitution was being indulged in? A. Nothing at all.

Mr. DUGGAN.—We object to that and move to strike the answer.

Objection sustained and motion granted. Defendants except.

Q. Did you ever visit the cabaret while you were there?

A. My daughter and I went in several times with the Munsons.

(Testimony of Mrs. Mabel Pierce.)

Q. That was about what time of year?

A. I couldn't say—I couldn't say just the date; it was a short time before they left there.

Q. Do you remember when they left?

A. No, I don't know that.

Q. Was it before or after Labor Day, do you remember?

A. No, I don't believe I could say that.

Q. Was it in the summer?

A. We went in to hear them sing, my daughter and I.

Q. During your visits to the cabaret there, did you see anything of any immoral nature?

A. Nothing at all.

Q. Did you see any drunken or dissolute characters there?

A. Nothing at all. I passed through there many times when I was going to work, had to go through there to get to Mrs. Kelly's or get in and never saw anything, nothing but the very best.

Mr. COFFEY.—That will be all.

Cross-examination by Mr. DUGGAN.

Q. Mrs. Pierce, you spoke of going in there with the Munsons—that was when the Munsons were there? A. Yes, sir. [159—146]

Q. That was quite a while after Mr. Kelly was arrested, wasn't it?

A. I don't know anything about that.

Q. Didn't you hear anything about Mr. Kelly being arrested?

A. Yes, but I didn't put down any dates, or keep

(Testimony of Mrs. Mabel Pierce.)

it in my mind. We just went in several times and heard them sing and that is all I can tell—I couldn't tell dates at all; I don't remember.

Q. What time of day did you go?

A. In the evening.

Q. About what time?

A. Possibly it was nine or ten o'clock, somewhere along there, I think.

Q. That is while the Munsons were singing there?

A. Yes, sir.

Q. Were there any other women there at that time?

A. Yes, there was one woman there,—I don't know her name, with Mrs. Munson, with them; she sang also.

Q. While Margaret Hilkert and Mildred Hilkert were there, were you in the pool-hall?

A. No, I was not.

Witness excused. [160—147]

Testimony of Tom W. Haines, for Defendants.

TOM W. HAINES, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. State your name. A. Tom W. Haines.

Q. Where do you reside? A. Anchorage.

Q. I will ask you, Mr. Haines, during the latter part of August or the first of September, when the Government witnesses Margaret Hilkert and Mildred Hilkert were working at the Kelly pool-room, whether or not you were requested by Mr. Kelly on one occasion—

(Testimony of Tom W. Haines.)

Mr. DUGGAN.—We object as leading.

Q. Were you at the Kelly pool-room one evening just after the performance when the Hilkert girls had gone downtown?

A. In the latter part of August one night, yes.

Q. I will ask you if Mr. Kelly made any request of you at that time? A. Yes.

Q. You may state what Mr. Kelly requested you to do.

A. It was after the performance had closed, at two o'clock, and we were playing cards back where the bowling-alleys are, and the girls had left to go to lunch or some place, I don't know where, and Mrs. Kelly said, "We will continue playing until the girls return because I have to let them in."

Cross-examination by Mr. DUGGAN.

Q. You say you were playing cards?

A. Yes, sir.

Q. For money? [161—148]

Objected to—objection sustained.

Q. Mr. Haines, on or about the time to which you have just testified, various other parties being present, including yourself, Mr. Kelly and Mr. Mossman, were you not intoxicated there?

Mr. MURPHY.—We object to that as incompetent, irrelevant and immaterial, having nothing to do with the case and improper cross-examination.

Objection overruled—defendants allowed an exception.

Q. At this time that you have testified to or about that time, didn't Mr. Mossman come in when

(Testimony of Tom W. Haines.)

you were drinking white mule in Kelly's place and take it away from you?

Same objection. Objection sustained.

(By Mr. MURPHY.)

Q. On the occasion mentioned, who was present?

A. Only one man I knew—there were three or four men present but only one man that I knew.

Witness excused. [162—149]

Testimony of Frank B. O'Shea, for Defendants.

FRANK B. O'SHEA, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. What is your name?

A. Frank B. O'Shea.

Q. What is your business? A. Brakeman.

Q. By whom are you employed now?

A. The commission.

Q. How long have you been in the employ of the commission? A. Going on two years.

Q. Always in the capacity of brakeman?

A. Fifteen months.

Q. Where are you employed now? A. Mile 35.

Q. Do you know the defendants Frank and Mrs. Grace Kelly? A. I do.

Q. Were you ever in their place of business in Anchorage, Alaska, during the month of August and the early part of September, 1921? A. Yes, sir.

Q. Do you know Miss Margaret Hilkert and Miss Mildred Hilkert? A. Yes, sir.

Q. Do you know what they were doing there?

(Testimony of Frank B. O'Shea.)

A. They were entertainers.

Q. What was that entertainment as far as you know—what was the nature of it generally?

A. One was a musician and one a singer.

Q. One played the piano and the other sang?

A. Yes.

Q. Did you ever have any dispute with Mrs. Kelly in the Kelly [163—150] pool-hall in the latter part of August, 1921?

A. I had no dispute but I remember being slapped in the face by her.

Q. Tell the jury what the occasion of that was.

A. I lost my head. Benedict, a partner of mine, and I, we got talking too loud and I used vile language and Mrs. Kelly brought me to my senses by slapping me in the face and I immediately apologized; it was a remark she said I shouldn't use in the presence of ladies and it brought me to my senses and I apologized.

Q. Whom did she refer to by the ladies, those who were in the pool-hall? A. Yes, sir.

Q. Did you apologize then for the use of this language? A. I did.

Q. And when she referred to the ladies present, she meant the Misses Hilkert, did she?

A. Mrs. Mildred Bowles, I think that is her name, and Margaret Johnson were both present.

Q. They were there when Mrs. Kelly made this remark about the ladies? A. Yes.

Q. And Mrs. Kelly was evidently referring to those ladies?

(Testimony of Frank B. O'Shea.)

A. She undoubtedly was referring to them because they were there—she made the remark, ladies.

Q. Were there any other ladies there besides the Misses Hilkert and Mrs. Kelly?

A. Not to my knowledge, no.

Q. If there had been, you would have known about it? A. Yes. [164—151]

Q. Did you ever have any conversation with either of the Misses Hilkert regarding their employment there?

Mr. HURLEY.—We object to that unless it is shown the Kellys were present or goes to the rebuttal of something already testified to.

The COURT.—This is asked for the sole purpose of showing the character of the house by statements made by these young ladies?

Mr. RAY.—No, sir—that is not the purpose. The purpose is to rebut the testimony which has been offered in this case and admitted by your Honor from which inferences may be drawn showing the intent the Kellys had on the third day of August when they sent for these people. I do not consider it impeaching testimony but direct testimony on the question of intent.

Mr. HURLEY.—If this goes to anything that the girls testified to when they were on the stand, we have no objection but if they are trying to lay the foundation for an impeaching question we object to it, on the ground that there has been no foundation laid, in the manner prescribed by law.

(Testimony of Frank B. O'Shea.)

Mr. RAY.—We are not trying to impeach anyone; we are trying to introduce evidence from which the intent with which the defendants acted on August 3, 1921, when they sent for these girls may be gathered.

The COURT.—Are you trying to elicit from this witness statements made by the girls? Please read the question, Mr. Reporter.

The question was read as follows:

Q. Did you ever have any conversation with either of the Misses Hilkert regarding their employment there? [165—152]

The COURT.—It seems to me it is an impeaching question.

Mr. HURLEY.—We object to it on the ground that there is no proper foundation laid, and it is incompetent.

The COURT.—Are you asking now for a statement made by one of the girls to this young man?

Mr. COFFEY.—The purpose is to show the attitude of these girls toward their employment and the place generally; there is no impeachment.

Mr. DUGGAN.—Then we object to it as being immaterial.

The objection was by the Court overruled.

A. I had casual conversation with them, none I can recall in particular. My mind might be refreshed by some matter but I can't remember right now any particular conversation I had.

Q. Did you ever have any conversation with

(Testimony of Frank B. O'Shea.)

them regarding quitting their employment?

A. No lengthy conversation. I was up in the dance hall one night and they told me they were going to quit.

Q. When?

A. It was on Saturday night. I was dancing with Mrs. Bowles and she made the remark she was going to quit and I told her I guessed that was her business.

Q. Did she give any reason?

A. None I remember, no.

Q. You say you danced with her frequently?

A. I was dancing with her that night, not frequently, no, very seldom.

Q. During your visits to the pool-room did you ever see anything that would indicate to your mind that these girls were being used for the purpose of prostitution? A. No.

Q. That there was any signs of any debauchery? [166—153] A. No, I did not.

Q. What do you know of the character of the people that frequented the place there, the pool-room?

A. I never could see anything the matter with the character of the people. You don't expect to find the best kind of people in cabarets but as a general thing I didn't see anything wrong with the people.

Q. You visited the cabaret frequently?

A. I did.

(Testimony of Frank B. O'Shea.)

Q. What were the conditions there—did they tend to immorality in any way?

A. Not that I could see.

Q. Did you ever have a talk with a man named McNamara concerning this trial?

Mr. HURLEY.—We object as immaterial.

Objection sustained; defendants allowed an exception.

Q. Mr. O'Shea, did anyone ever offer you any money to appear as a witness in this trial on behalf of the Government?

Mr. HURLEY.—We object to that; objection sustained; defendants except.

Mr. COFFEY.—That's all.

Cross-examination by Mr. HURLEY.

Q. What do you understand by the word debauchery—what does it mean?

A. Well, my idea of debauchery—I am not educated, I will have to admit the fact but I will do the best I can. A general outline of debauchery would be anywhere from getting drunk to soliciting trade. [167—154]

Q. At that pool-room, at any time you were in there, you never saw anybody drunk or getting drunk? A. I can't recall.

Q. Your mind was in a pretty precarious condition there one evening, wasn't it, a little foggy?

A. Several evenings.

Q. Quite foggy? A. Yes, sir.

Q. And things might have happened that you wouldn't have been very conscious of? A. Yes.

(Testimony of Frank B. O'Shea.)

Q. Along about that time you used to drink quite a bit yourself? A. Off and on, yes.

Q. You saw other men that were in there drunk, didn't you?

A. Undoubtedly there was some in the cabaret that was drunk.

Q. Quite a number of them intoxicated?

A. I couldn't say the number—I have seen some drunk.

Q. Different times—were you there in the latter part of August and the early part of September?

A. Yes.

Q. In the latter part of August and the early part of September? A. During that time, yes.

Q. Now, I will ask you if you didn't say, about three nights ago in the Union Restaurant, in the presence of Mr. R. Shively and Harry Barnes, Harry Bowers and Mildred and Margaret Hilkert, that your last instructions from the defendants was to paint the character of Margaret and Mildred Hilkert as absolutely white—that you were not to say anything that would in any way tend to lower their character or anything of that kind, or words to that effect—did you make that statement?

A. I met the four parties named in that restaurant, yes. [168—155]

Q. Didn't you make that statement?

A. I will tell you the statement I made.

Q. Did you make that statement—did you make a statement to that effect?

A. Not to that effect, no, not particularly.

Q. Explain what you did say.

(Testimony of Frank B. O'Shea.)

A. I went in there; I had always been on friendly terms with those girls at all times and one of the gentlemen in the place—I don't know, I kinder felt like an outsider because I was subpoenaed on the part of the defense, but have always been on friendly terms with those girls. The conversation came up—I may have brought it up myself, I can't recall; anyway one of the gentlemen spoke up, I don't know which one it was, and said they were both cautioned not to speak to any of the defendant's witnesses, and I spoke up and said, "I didn't care whether they have been cautioned or not, and I have been cautioned, I will speak to either one of you when I see you or any time I see you"; and I spoke up and said, "Any way, the only thing I have got to say is this: It is the easiest thing for me to go on the witness-stand on the part of the defense, as all I can say is that you are both perfect ladies and I think that is what you are trying to prove."

(By Mr. COFFEY.)

Q. Did you frequent other pool-halls around town? A. Yes, sir.

Q. Did you ever see any drunken people in other pool-halls?

Mr. HURLEY.—We object to that.

Objection sustained; defendants except.

Q. Didn't the District Attorney's office or somebody connected with it tell you that they didn't want to blacken the [169—156] character of these girls or did want to blacken the character of these girls?

(Testimony of Frank B. O'Shea.)

Mr. HURLEY.—We object to that.

Q. Did Mr. McNamara say that to you?

Mr. HURLEY.—We object.

Objection sustained; defendants except.

Q. To get the matter clear, you told these young ladies and all these gentlemen present on this occasion, in the Union Restaurant, that you didn't know anything bad about the girls?

A. I certainly did.

Q. As far as you knew, the girls were always first class, good girls?

A. They were in every respect, as far as I could see.

Q. And weren't you instructed by the defense that the defense didn't want to blacken the character of these girls; isn't that a fact?

A. Yes, that is a fact.

Witness excused. [170—157]

Testimony of William S. Elliott, for Defendants.

WILLIAM S. ELLIOTT, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. MURPHY.

Q. State your name.

A. William S. Elliott.

Q. State whether or not you have a lease from Mr. Kelly for the hall portion of the Robarts Building for Saturday nights?

A. I have had a lease—I believe it has about expired.

(Testimony of William S. Elliott.)

Q. Did you have that lease during the months of August and September, 1921? A. I did.

Q. Do you know who the Misses Hilkert are or were along in the latter part of August and September of this year?

A. I probably know them by sight—I don't know them by name.

Q. The girls that were working there.

A. I knew a couple of girls worked there—I knew them by sight.

Q. State whether or not you ever made a complaint to Mr. Kelly as to their conduct on the dance floor, in the dance you conducted upstairs.

Mr. DUGGAN.—We object to that as calling for a conclusion of the witness and is immaterial.

Objection overruled.

A. Relative to the conduct on the floor, I can't say that I did—I did make a complaint to Mr. Kelly, though.

Q. State the nature of that complaint?

A. As to the girls traveling upstairs and downstairs from the pool-room into the dance floor and back again at intervals [171—158] between dances. I did object to that and told Mr. Kelly that the girls had to stay either upstairs or downstairs, one or the other, that they couldn't travel back and forth.

Cross-examination by Mr. DUGGAN.

Q. You are leasing the building Mr. Kelly now?

A. Yes, I have been, up to the first of February.

Witness excused.

Recess to 2 P. M. [172—159]

Testimony of John S. Williams, for Defendants.

JOHN S. WILLIAMS, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. What is your name?

A. John S. Williams.

Q. What business are you engaged in?

A. Soldier.

Q. Located here in Anchorage, the barracks?

A. Yes, sir.

Q. Have you ever been employed by Mr. Kelly?

A. Yes, sir.

Q. You know Mr. Kelly and Mrs. Kelly?

A. Yes, sir.

Q. What time were you employed there?

A. September, October, November.

Q. Of last year, 1921? A. Yes.

Q. In what capacity?

A. Looking after the pool-tables.

Q. What were your hours of employment?

A. From seven in the evening to twelve o'clock.

Q. Were you there when the Misses Hilkert were employed there as cabaret singers and entertainers? A. Yes, sir.

Q. During the time of your employment there, what was the character of the people that frequented that pool-room?

A. They seemed all right,—people that like to go out and be [173—160] entertained by singing and playing pool.

(Testimony of John S. Williams.)

Q. Did you ever observe any dissolute characters there? A. No, sir.

Q. Did you ever see any great evidence of any drunkenness? A. No, sir, I did not.

Q. Did you ever see any evidences of immorality, debauchery and prostitution? A. No.

Q. Did you ever have any occasion to deliver any messages to the Misses Hilkert while they were employed there? A. Yes, sir.

Q. When were they delivered, Mr. Williams?

A. About nine o'clock one evening.

Q. To whom, Miss Mildred or Miss Margaret?

A. The tallest one.

Q. That would be Mildred? A. Yes.

Q. From whom was that message received?

A. From Chauncey Peterson.

Q. Did you deliver it? A. Yes, sir.

Q. Was there any remonstrance made of any kind by Mr. Kelly?

Mr. HURLEY.—We object to anything Kelly did in regard to the message and what the message was, as incompetent and immaterial.

Objection overruled.

A. Yes, sir.

Q. What was it—just state to the Court and jury what it was.

A. I went down to deliver the message and Kelly said, "Where have you been?" "Upstairs delivering a message." "Damn it," he says, "don't [174—161] do that any more; you can't work for me if you deliver messages around here. I don't allow anything like that going on here." We ar-

(Testimony of John S. Williams.)
gued back and forth and he got pretty badly peeved and I walked out.

Mr. MURPHY.—That's all.

Cross-examination by Mr. HURLEY.

Q. You were working for Kelly at the time you delivered these messages? A. Yes, sir.

Q. Did you quit your employment with Kelly at that time? A. I did.

Q. I thought you said you worked during September and October?

A. I did, I hired back again.

Q. When were you employed again?

A. Three days after.

Q. Did he fire you again and employ you in three days? A. No.

Q. How long were you there while these girls were there?

A. All the time except those three days.

Q. You were working there all the time they were excepting those three days? A. Yes, sir.

Witness excused. [175—162]

Testimony of Robert S. Temme, for Defendants.

ROBERT S. TEMME, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. What is your name?

A. Robert S. Temme.

Q. You are a resident of Anchorage?

A. Yes, sir.

Q. What is your business?

(Testimony of Robert S. Temme.)

A. Moving picture business—manager of the Empress Theatre here.

Q. Have you ever employed or caused to be employed people from the outside as singers in your theatre, or performers? A. Yes, sir.

Q. How long have you been employed in this business? A. A matter of about three years.

Q. When you employed the parties you referred to in my last question, did you advance transportation?

Mr. DUGGAN.—We object as not calling for any evidence that will meet the issues in this case and as incompetent, irrelevant and immaterial,—incompetent to prove anything or disprove anything charged against the Kellys or either of them.

Objection sustained; defendants allowed an exception to the ruling.

Q. Is it customary, Mr. Temme, to advance transportation to people that you are employing from the states?

Mr. DUGGAN.—We object as leading.

Q. What is the custom in employing performers, if any?

A. It is customary, in all transactions of that nature, to [176—163] advance transportation; so far as my knowledge is concerned we have never been able to talk business to an entertainer of any kind in the states without sending transportation to the states, whether Southeastern Alaska or other points.

(Testimony of Robert S. Temme.)

Q. And that is the usual custom, as far as you know? A. Yes, sir.

Q. How is that transportation repaid that is advanced to performers?

A. In the instances that I have been connected with we have paid the transportation as a part of the consideration for which they are coming to work for us.

(By Mr. HURLEY.)

Q. About how many entertainers have you ever had come up to Anchorage from the outside?

A. We have only had, as my memory serves me now, one who came.

Q. You don't know anything about the custom of bringing women here for purposes of prostitution or debauchery or other immoral purposes?

Objected to; objection sustained.

Q. In your capacity as manager of the Anchorage Theatre, do you know the custom that prevails in the employment of performers in the Empress Circuit, all over Alaska? A. Yes, sir.

Witness excused. [177—164]

Testimony of M. D. Miller, for Defendants.

M. D. MILLER, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. What is your name? A. M. D. Miller.

Q. What is your business?

A. I have not been in any business lately.

Q. You are a resident of Anchorage now?

A. Yes, sir.

(Testimony of M. D. Miller.)

Q. Do you know the defendants? A. Yes, sir.

Q. How long have you known them?

A. Ever since I came to town,—that is about seven months, I think.

Q. Have you been a frequent visitor in the Kelly pool-hall? A. Yes, sir.

Q. Do you know the Misses Margaret and Mildred Hilkert? A. Yes, sir.

Q. Were you in the Kelly pool-hall on or about the 20th day of August? A. Yes.

Q. Did you observe any incident that occurred there in which Mr. Kelly and one of the Misses Hilkert were concerned? A. Yes, sir.

Q. What was that?

A. That was in the evening about ten o'clock. She grabbed hold of some gentleman, I don't remember which it was, and commenced dancing at that time and Kelly says to me, "My goodness, that doesn't look right," and he walked over and asked the girl to [178—165] please cut the dancing out, he didn't think that was the right kind of a dance and she said, "What are you running here, a church," and Kelly walked away and she whispered something under her breath, I didn't catch that part of it, and that is all there was to it.

Mr. COFFEY.—That is all.

No cross-examination.

Witness excused.

Testimony of Frank L. Tondro, for Defendants.

FRANK L. TONDRO, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. State your name. A. Frank L. Tondro.

Q. Better known as—

A. The Malamute Kid.

Q. How long have you been in Alaska?

A. I came here in 1897.

Q. What business have you engaged in?

A. Transportation business with dogs.

Q. Better known as dog mushing. A. Yes, sir.

Q. Where are you working now?

A. I am breaking a trail between Camp 5 and the Kantishna.

Q. Up on the railroad? A. Yes, sir. [179—166]

Q. Do you know the defendants? A. Yes, sir.

Q. Were you in Anchorage in the latter part of August and the first part of September?

A. Yes, sir.

Q. While here did you visit the Kelly pool-hall?

A. Yes, sir.

Q. Do you know the Misses Hilkert, Margaret and Mildred? A. I met the ladies there.

Q. Did you ever have any occasion to visit either of these young ladies in their rooms?

A. No, I never did.

Q. Did you attempt it?

(Testimony of Frank L. Tondro.)

Mr. DUGGAN.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled.

A. Why, I met the ladies there, yes, and I made a proposition to the ladies to go and stay with them and she said that Mr. and Mrs. Kelly wouldn't allow it and she wasn't there for that business, so I let it go.

Q. That was the end of it?

A. Yes, sir; in a few minutes.

Q. During your visit there and you have been in your Alaskan experience a frequenter of pool-rooms, as all men in the North are— A. Yes, sir.

Q. Did you observe any difference between this pool-room and other pool-rooms throughout the Territory? [180—167]

Mr. DUGGAN.—We object to that as incompetent.

Objection sustained; defendants allowed an exception.

Q. From your frequent visits there while you were in Anchorage, in August, 1921, describe to the Court and jury the conditions that prevailed there generally, as to the type of people that went there and the class of people you saw in there.

A. They were all, I should judge, good people, good business men. I went in there to see a business man; that was what brought me in there in the first place. I had important business with the man I went in to see and this young lady came up and I spoke to her, as I told you.

(Testimony of Frank L. Tondro.)

Q. Did you see any evidence of practices of prostitution or debauchery? A. No, sir.

Mr. COFFEY.—That is all.

Cross-examination by Mr. HURLEY.

Q. Is it your usual custom and practice to go into a place, a first-class place where there is no sign of debauchery and prostitution and only people of fine character are in there, and walk up to a girl in the place and ask her to go up in her room and stay with you?

A. It all depends on how it comes up.

Q. You have testified in regard to that matter, what you did up there? A. Yes, sir.

Q. And is it your custom to go into places that are first-class places, that you think are being run in a first-class manner, to approach a girl on that question in a place of that kind—is that your usual practice? A. If my business calls me there, I do. [181—168]

Q. It doesn't make any difference about the character of the place—you would ask any woman that kind of a question, any place, would you, if you took the notion? It wouldn't make any difference what kind of a place it was or who the woman was or anything else,—it wouldn't make any difference to you?

A. If she gave me any inducement, I think I would.

Q. Did this woman give you any inducement in this place?

A. She must have or I wouldn't have asked her.

Q. What were they?

(Testimony of Frank L. Tondro.)

A. They were very friendly to me and one thing and another, and came up when I was doing business with another gentleman, and of course I naturally asked her where she was rooming and she told me—that is how it happened.

Q. And you think at that time that this was a first-class place and there wasn't anybody in there but first-class people? A. Yes, sir.

Q. You still had that notion about the place—didn't she tell you that she was not there for that purpose?

A. Yes, she told me Mr. and Mrs. Kelly didn't allow it.

Q. She wasn't there for that purpose?

A. Yes, sir.

(By Mr. RAY.)

Q. You afterwards got well acquainted with these young ladies? A. Yes, sir.

Q. And as far as you know there is nothing out of the way in the conduct of these young ladies?

A. No, sir,—not a word after that. That is the only time we had any such conversation and after that they treated me fine and I treated them like ladies.

Q. And your relations were quite intimate for a period of a month [182—169] or so?

A. Not a month,—I judge about a week after that.

By Mr. HURLEY.—You were quite a steady customer of Kelly's pool-room at that time, while you were here? A. Yes, sir, I presume so.

Witness excused.

Testimony of Miss Mary O'Bryan, for Defendants.

MISS MARY O'BRYAN, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination by Mr. COFFEY.

Q. What is your name? A. Mary O'Bryan.

Q. You are in business here? A. Yes, sir.

Q. What line?

A. Ladies furnishing goods.

Q. During the middle of August, 1921, did Mrs. Grace Kelly—first do you know Mrs. Kelly?

A. I know her, yes.

Q. During the latter part of August, 1921, did she in company with two other young ladies call at your store for the purpose of purchasing goods?

A. Yes—after the dress was selected.

Q. Answer yes or no?

A. Yes, they called.

Q. Did they purchase any materials there?

A. A dress. [183—170]

Q. What was said when the purchase was being made, if you recall?

A. There was nothing said, only to sell the dress. I sold the dress; they selected it.

Q. Was there anything said about the dress being worn before? A. No, sir.

Q. Was the dress ever worn before?

A. No, sir.

Q. Is a dress of that type ever worn by people down the line that you know of?

(Testimony of Miss Mary O'Bryan.)

A. Not that I know of.

Q. Did you ever make such a statement?

A. No, sir.

Mr. COFFEY.—That is all.

Mr. DUGGAN.—We have no cross-examination.

Witness excused.

Defendants rest. [184—171]

REBUTTAL.

Testimony of J. B. Larson, for the Government (In Rebuttal).

J. B. LARSON, a witness called and sworn in behalf of the Government, in rebuttal, testified as follows:

Direct Examination by Mr. HURLEY.

Q. What is your name? A. J. B. Larson.

Q. What business are you engaged in in Anchorage?

A. I have a grocery store on the corner of Fourth and A and work for the Commission.

Q. Are you acquainted with Mrs. Rose McFarland? A. Yes, sir.

Q. Did you have occasion to go over to her place about two weeks after Mr. Kelly, the defendant in this case, was arrested? A. Yes, sir.

Q. What did you go over to her place for?

A. I went over with some groceries.

Q. While you were there, you being the only two persons present, did you have a conversation

(Testimony of J. B. Larson.)

with her in regard to a statement that Mr. Kelly, the defendant, had made to her? A. Yes, sir.

Q. What was that—what did she say to you in regard to that?

A. I don't know that I remember it just word for word.

Q. What was the effect of it?

A. The effect of it—

Q. Can you remember the exact time?

A. I cannot,—I don't remember the exact date, no, sir, but as I remember, to the best of my judgment, it was about two or three weeks after Kelly was arrested. [185—172]

Q. State what was said?

Mr. RAY.—We object as not binding to prove any of the issues in this case, the charge against the defendants, and as being incompetent, irrelevant and immaterial.

The COURT.—It goes to the credibility of the witness Mrs. McFarland—the question was put to her, the impeaching question.

Q. At that time and at that place, when you and Rose McFarland were present, did not Rose McFarland say in effect to you that Kelly, referring to this defendant here, told her that he had been handling sporting women for years and he didn't want a couple of chippies to put anything over on him, or words to that effect? A. Yes, sir.

Q. Is it or is it not a fact that at the same time and place, the same parties present, that Rose McFarland told you that she did not know anything

(Testimony of J. B. Larson.)

that would help Kelly in this case, referring to this case? A. Yes, sir; she did.

Cross-examination by Mr. RAY.

Q. You have been more or less active in reference to this prosecution, haven't you? A. No, sir.

Q. Haven't you been in constant consultation with the District Attorney's office?

A. Not referring to this case.

Q. You haven't discussed the case at all?

A. No, I can't say that I have. [186—173]

Q. When did you inform the District Attorney that you had had this conversation with Mrs. McFarland?

A. Mr. McCain and I talked it over last evening.

Q. And did you talk it over to-day?

A. Yes, sir.

Q. During the noon recess?

A. Since twelve o'clock.

Q. Did he tell you what Mrs. McFarland said on the witness-stand?

A. No, I don't know that he did.

Q. Did he make any statement as to what she testified to? A. Not in my presence.

Q. Not since the noon recess? A. No, sir.

(By Mr. HURLEY.)

Q. You didn't talk with Mr. Duggan or Mr. McCain or myself in regard to this to-day until after you were subpoenaed?

A. No, I was called to the telephone and a sub-

(Testimony of Sherman Duggan.)

poena was handed to me when I came into the room by Mr. Mossman.

Witness excused. [187—174]

Testimony of Sherman Duggan, for the Government (In Rebuttal).

SHERMAN DUGGAN, called and sworn as a witness in behalf of the Government, in rebuttal, testified as follows:

Direct Examination by Mr. HURLEY.

Q. Mr. Duggan, did the defendant Frank Kelly, or Mrs. Kelly, ever come to you while you were practicing law here in Anchorage, or at any other time, and get advice from you in regard to running a cabaret, or in regard to anything in any manner in connection with the conducting of their business here in Anchorage?

Mr. RAY.—We object; it would be a privileged communication that cannot in any manner be waived by an attorney who afterwards becomes District Attorney and prosecutes a case against a former client.

The COURT.—That is true, but it may be waived by the client himself. It cannot be done without the consent of the client but whenever the client himself discloses a part, he thereby waives the confidential nature of it to that extent and no further. Mr. Kelly was asked if he had consulted an attorney and it crept out two or three times in the course of the trial that the attorney he said he had consulted was Mr. Duggan. It would

(Testimony of Sherman Duggan.)

be unfair to the defendant and to Mr. Duggan if Mr. Kelly were allowed to testify he consulted an attorney, and it came out that that particular attorney was Mr. Duggan and Mr. Duggan was not permitted to testify at all or make any denial. The objection will be overruled.

Mr. RAY.—We except to the ruling on the ground that during the progress of the trial the District Attorney said, you may show anything I may have done in this matter and thereby himself violated his oath as an attorney, in the attempt to violate [188—175] a confidential relation with his client.

The COURT.—Mr. Duggan's name having been brought before the jury after they were in the box, I hold that the privilege of the defendant was waived by him to the extent that he waived it himself by asking the question regarding it. The objection will be overruled, and exception allowed.

Q. Did Mr. Kelly ever come to you to advise with you regarding the conduct of his business there or running a cabaret or anything of that kind?

Mr. RAY.—We object to that for the same reason,—on the grounds I have stated.

Objection overruled; defendants allowed an exception.

A. Mr. Kelly never consulted me about running a cabaret or employing entertainers.

Mr. HURLEY.—That will be all.

(Testimony of Sherman Duggan.)

Cross-examination By Mr. RAY.

Q. I hand you a paper marked for identification Defendants' Exhibit No. 7 and ask you to state whether or not your signature is on that paper? (Handing witness paper.) A. Yes, sir.

Q. Mr. Duggan, it bears no date—can you tell the approximate date when that receipt was given?

A. Well, no, I don't know that I can. It wasn't very long before I went away I don't think.

Q. That would be around the first of August or the first of July or when? Can you fix any time?

A. About the middle of September, I should judge—I wouldn't be sure, however.

Mr. RAY.—I presume you have no objection to this going in?

Mr. DUGGAN.—None at all. [189—176]

Mr. RAY.—We offer it in evidence.

The receipt in question is admitted in evidence, without objection, marked Defendants' Exhibit No. 7, and reads as follows:

Defendant's Exhibit No. 7.

"Ragtime Kelly,

To Sherman Duggan, Debtor.

Location notices, powers of attorney, etc.

Also advice $25.00

Paid

S. DUGGAN."

Q. I call your attention to one item there, Ragtime Kelly to Sherman Duggan, Debtor, Location notices, powers of attorney, etc. Also advice—I

understand you to say that the advice shown to be paid for by the receipt was in no manner connected with the opening or advice relevant to the opening up of a cabaret—you heard Mr. Kelly's statement?

A. It was not, no, sir, and Kelly knows that.

Witness excused.

Government rests.

Mr. RAY.—I wish to make two motions.

WHEREUPON, the jury having been excused—

By Mr. RAY.—Comes now the defendant, Mrs. Grace Kelly, and moves the Court to instruct a verdict of Not Guilty on all the evidence submitted in the case, for the reason that said evidence as submitted in no way tends to connect the defendant, Mrs. Grace Kelly, with the offense charged in any of the eight counts in the indictment in said cause.

By Mr. RAY.—My second motion is as follows: Comes now the defendants, Mrs. Grace Kelly and Frank Kelly, and moves the [190—177] Court to instruct the jury to return a verdict of Not Guilty as to both defendants upon all the counts in the indictment in this case on the ground that the uncontradicted evidence submitted in this case shows that the witnesses Misses Hilkert came to Alaska under a contract of employment with the defendant Frank Kelly, entered into by means of telegraphic and cable communication, and that as a consideration of the contract and one element thereof, the witnesses, the Misses Hilkert, were to repay Frank Kelly, the defendant, the cost of transporta-

tion advanced by the said Kelly to the said Misses Hilkert, upon the basis of a deduction of $5.00 per week from the contracted salary as set forth in such telegraphic communication, and that the advance of such transportation with the contract to repay as shown by the uncontradicted evidence in this case, does not come under the Interstate Commerce Regulations and is not a violation of the so-called White Slavery Act.

After argument both motions were by the Court denied and defendants allowed an exception to the rulings. (Jury returns.)

WHEREUPON, after argument by counsel, the Court delivered his instructions to the jury as follows: [191—178]

In the District Court for the Territory of Alaska,
Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY and MRS. GRACE KELLY,
Defendants.

Instructions to the Jury.

Gentlemen of the Jury:

The defendants, Frank Kelly and Mrs. Grace Kelly, are charged by this indictment in eight counts with the crime of causing girls to be transported in interstate commerce for purposes of prostitution or debauchery.

In the first count it is charged that on August 3, 1921, the defendants did wilfully, unlawfully, knowingly and feloniously cause two girls, named respectively Mildred Hilkert and Margaret Hilkert, to be transported from Seattle, Washington, to Anchorage, Alaska, on the steamship "Alameda," with the intent at the time on the part of said defendants to entice and induce said girls to become prostitutes, and to give themselves up to debauchery, and engage in other immoral practices.

The second count charges that said defendants aided and assisted in obtaining said transportation for said girls for the unlawful purposes stated in the first count.

The third count charges that said defendants procured tickets for said transportation of said girls for the unlawful purpose stated.

The fourth count charges that said defendants caused tickets to be procured for said girls for said transportation for the unlawful purposes stated.

The fifth count charges that said defendants assisted in procuring tickets for the transportation of said girls for the unlawful [192—179] purposes stated.

The sixth count charges that the said defendants induced and persuaded said girls to go from Seattle to Anchorage with the intent on the part of the said defendants that said girls should engage in the unlawful practices stated; and that they aided and assisted in causing said girls to be carried as already stated on the steamship "Alameda" from Seattle to Anchorage.

The seventh count charges that said defendants unlawfully caused said girls to be persuaded and enticed to go from Seattle to Anchorage, with the intent and purpose on the part of the defendants at the time that the said girls should engage in the immoral practices stated; and did thereby cause and aid and assist in causing the said girls to be so carried.

The eighth count charges that said defendants aided and assisted in persuading, inducing and enticing said girls to go from Seattle to Anchorage with the intent and purpose at the time on the part of the defendants that said girls should engage in immoral practices as stated, and that they thereby caused and assisted in causing the said girls to be carried and transported as passengers by a common carrier from Seattle to Anchorage for the unlawful purposes stated.

In order to find the defendants, or either of them, guilty of the offense charged in any count of the indictment, it is necessary for the prosecution to prove to your satisfaction, beyond all reasonable doubt, that such defendants, or either of them, did, on or about the day named, at Anchorage, Alaska, do and perform all of the acts charged in said count necessary to constitute the crime charged, as will hereafter be more fully explained to you.

It is not necessary for you to find that the offense charged in any count was committed, if you find that it was committed, by either of the defendants, on the day named in the indictment; it is sufficient if you find that such an offense was committed as

charged at any time within three years prior to the finding of the indictment. [193—180]

2.

You are instructed that the indictment in this case is a mere accusation or charge against the defendants and is not of itself any evidence of the defendants' guilt, and no juror should permit himself to be influenced against the defendants because the indictment has been returned against them.

3.

In this case, as in all criminal cases, the jury and Judge have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of fact arising from the evidence. It is the duty of the Judge to decide the questions of law involved in the trial of the case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions. But your power of judging the effect of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

4.

The jury are instructed that the law presumes every defendant in a criminal trial to be innocent until his guilt is proven to the satisfaction of the jury beyond all reasonable doubt. The burden of proving beyond all reasonable doubt every material allegation necessary to establish the defendants' guilt rests upon the prosecution throughout the

trial, and the burden of proof never shifts to the defendant. His presumption of innocence is a right guaranteed to him by law and must be given full force and effect by you until you become satisfied from a consideration of all the evidence in the case of his guilt beyond all reasonable doubt. [194—181]

5.

A reasonable doubt is such a doubt as may fairly and naturally arise in your minds after fully and fairly considering all the evidence in the case. It is that state of the case which leaves the minds of the jurors, after comparison and consideration of all the evidence, in such condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant. A moral certainty is not an absolute certainty, but such a certainty as excludes every reasonable hypothesis creating a doubt.

6.

As already stated, the defendants are charged in the indictment with the crime of transporting or aiding to transport the two girls named, in interstate commerce, from Seattle to Anchorage, with the intent to induce, entice and persuade said girls to become prostitutes, or to give themselves up to debauchery or other immoral practices. In order to find the defendants, or either of them, guilty under any count of the indictment, you must find it proved by the evidence beyond all reasonable doubt that the defendants, or either of them, did secure or aid in securing such transportation, as charged, with the

intent at the time of inducing, enticing or persuading said girls, or either of the said girls, to engage in said immoral practices, or some of said practices. If you find that the evidence proves beyond all reasonable doubt that one of the defendants is guilty as charged but fails to prove beyond all reasonable doubt that the other defendant is guilty as charged, you will return a verdict of guilty as to the one so proven guilty and a verdict of not guilty as to the other.

7.

To debauch is to corrupt in morals or principles; to lead estray [195—182] morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery, then, is an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up vicious habits. The term debauchery, as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually or tends to lead to sexual immorality; not necessarily drunkenness or immorality, but here it leads to the question in this case as to whether or not the influences in which these girls were surrounded by the employment which defendants called them to, did not tend to induce them to give themselves up to a condition of debauchery which eventually, necessarily and naturally would lead to a course of immorality sexually.

8.

If you find from the evidence that the defendants, or either of them, furnished or aided in furnishing

the transportation that brought the girls from Seattle to Anchorage, and caused it to be delivered to the girls for that purpose, the only remaining question for you to determine is the purpose or intent either defendant had in mind at the time in securing or aiding to secure said transportation; that is, did either defendant in so securing or aiding to secure said transportation, if you find that either defendant, or both, did secure or help to secure the same, have in mind the intent to bring said girls or either of them to Alaska with the purpose to induce, entice or persuade said girls, or either of them, to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice. If you find beyond all reasonable doubt that said defendants, or either of them, did bring or aid in bringing said girls to Alaska from Seattle for any of the unlawful purposes named, then you will find such defendant or defendants guilty upon the count or counts which you so find to be proved beyond all reasonable [196—183] doubt.

But unless you do so find beyond all reasonable doubt that the defendants, or either of them, had such intent at the time said transportation was furnished, you cannot return a verdict of guilty against them, or against the one, if either, who lacked such intent at the time of furnishing said transportation.

If you find from the evidence that the defendants, or either of them, formed the intent and purpose after the girls arrived in Anchorage to persuade

them to enter upon any of the unlawful and immoral practices set forth in the indictment, such finding will not authorize a conviction in this case, because the defendants are not charged in the indictment with any unlawful act done or purpose arising after the girls arrived in Anchorage.

All the testimony admitted in the case other than that designed to show that defendants secured or aided in securing the steamship tickets which were the means of transporting the girls to Anchorage from Seattle was admitted for the sole purpose of showing the intent on the part of the defendants or either of them, in furnishing said transportation, and it is not to be considered by you for any other purpose. You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing.

If you find that any of the evidence admitted by the court may tend to show that other offenses may have been committed by defendants, or either of them, in or about the Kelly pool-hall or building while the girls were there, such evidence is to be disregarded by you unless you find that it has some bearing upon the question of the intent of defendants in securing said transportation to bring the girls from Seattle to Anchorage, and then it is to be considered only so far as you may find it may affect the question of such intent. [197—184]

9.

It is your duty to give to the testimony of each

and all the witnesses such credit as you consider their testimony justly entitled to receive, and in doing so, you should not regard the remarks or expressions of counsel, unless the same are in conformity with the facts proved, or are reasonably deducible from such facts and the law as given to you in these instructions.

10.

In determining the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the witness-stand; the interest of the witness, if any, in the result of the trial; the motives of the witness in testifying; the witness' relation to, or feeling for or against the defendants; the probability or the improbability of the witness' statements; the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak the truth, or otherwise, as to matters within the knowledge of such witness; and you should be slow to believe that any witness has testified falsely, but should try to reconcile the testimony of all the witnesses so as to give credit and weight to all the testimony, if possible. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper.

11.

You are instructed that the evidence is to be es-

timated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other [198—185] side to contradict, and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust.

12.

The law also makes it my duty to instruct you that you are not bound to find in conformity with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds.

You are also instructed that a witness who is wilfully false in one part of his testimony may be distrusted by you in other parts. If you find that any witness in this case has wilfully testified falsely in one part of his testimony, you are at liberty to reject all or any part of his testimony, but you are not bound to do so. You should reject the false part and may give such weight to other parts as you think they are entitled to receive.

13.

In this case the defendants have testified in their own behalf, as they had a lawful right to do. You are instructed that the credit to be given to their testimony, like that of all other witnesses, is left solely to the jury and you are to consider it the same as you would the testimony

of any other witness, provided, that you have a right in considering their testimony to consider also their interest in the event of the trial. [199—186]

14.

You are instructed that testimony introduced in evidence tending to prove former conviction of crime of a witness, or of a defendant testifying in his or her own behalf, is admissible only as affecting the credibility of such witness, that is to say, as assisting you in determining the weight you may give to such testimony; but, where an appeal from a conviction is taken from a justice court, or other inferior court, to a superior or appellate court, such conviction is not admissible in evidence, for a verdict of acquittal may be rendered on a retrial of the case; and you are cautioned and directed to cast aside from your minds and to give consideration in no degree whatever to the question propounded by the District Attorney to the defendant Frank Kelly as to such alleged former conviction.

15.

You are instructed that no evidence has been introduced in the case showing that the defendant Grace Kelly was concerned or involved in the acts constituting the charge contained in the first, third, fourth, sixth or seventh counts of the indictment. You will, therefore, return a verdict of Not Guilty as to Grace Kelly on the first, third, fourth, sixth and seventh counts of the indictment.

Before you can find the defendant Grace Kelly guilty on the second, fifth or eighth counts of the indictment, you must find it to be proved by the

evidence beyond all reasonable doubt that she aided or assisted in the offense charged in each of those counts respectively.

16.

If you find from the evidence that the negotiations which led to procuring the transportation that brought the Hilkert girls [200—187] from Seattle to Anchorage were wholly conducted by one of the defendants, and the prosecution has failed to prove beyond all reasonable doubt that the other defendant took any active or responsible part in securing, or aiding in securing said transportation, in such case it will be your duty to acquit that defendant on all the counts of the indictment. If you find, however, that such defendant actively advised the securing of the transportation, you may consider that fact in connection with all the other evidence in the case in determining the guilt or innocence of that defendant.

17.

You are instructed that you should not consider any evidence sought to be introduced but excluded by the Court, nor should you consider any evidence that has been stricken from the record by the Court, nor should you consider in reaching your verdict any knowledge or information known to you, not derived from the evidence as given by the witnesses upon the witness-stand.

You should not allow prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given to you by the Court.

Whatever verdict is warranted under the evi-

dence and the instructions of the Court, you should return, as you have sworn to do.

18.

If you find in this case that the defendants as a part of their contract of employment simply advanced steamship fare to the Hilkert girls in order to enable them to travel from Seattle, Washington to Anchorage, Alaska, and there to enter upon their contract of employment as entertainers, then your verdict will be not guilty as to both defendants upon each and every count in the indictment; [201—188] unless, however, you are satisfied beyond all reasonable doubt that at the time said transportation was provided, if it was so provided, by the defendants to the Hilkert girls, the defendant, Frank Kelly, and the defendant, Mrs. Grace Kelly, or either of them, furnished such transportation with the intent then and there to induce and entice the said Mildred Hilkert and Margaret Hilkert to become prostitutes and to give themselves up to debauchery and to engage in other immoral practices, or in any of such practices.

I have prepared two forms of verdict for you. You are not obliged to use verdicts prepared by the Court; you may write your own if you wish.

You have been instructed to return a verdict of not guilty as to Mrs. Kelly except as to the second, fifth and eighth counts of the indictment. You can use this verdict to find the defendant Frank Kelly either guilty or not guilty upon all the counts of the indictment and to find the defendant Mrs. Kelly not guilty upon all the counts

of the indictment or upon such counts as the Court has instructed you to return a verdict upon.

The other form of verdict takes up each count separately and you can fill that out according as you find guilty or not guilty upon each count of the indictment, bearing in mind the instructions given to you as to Mrs. Kelly.

In this case, gentlemen, unless it is objected to by either side, I am willing to send the exhibits to the jury. That has always been the custom until late years in this court. It is expressly provided in the civil code that all exhibits shall be sent to the jury but silent as to doing so in criminal proceedings and in view of the common-law rule that exhibits should not be sent in a criminal case, I have been reluctant heretofore to do it, but I find upon consulting the authorities that the matter, while the statute is silent, is wholly within [202—189] the discretion of the Court and in this case I think perhaps it would be better to send them, as I can see no ill result to anyone, either the Government or the defendants by so sending them. Therefore I send the indictment and the exhibits to the jury with the instructions.

Mr. RAY.—The defendants, Frank Kelly and Mrs. Grace Kelly, except to that portion of your Honor's instruction marked Number 5 on the question of reasonable doubt, the instruction reading as follows:

> "A reasonable doubt is such a doubt as may fairly and naturally arise in your minds after fully and fairly considering all the evidence in the case. It is that state of the case which

leaves the minds of the jurors, after comparison and consideration of all the evidence, in such condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant. A moral certainty is not an absolute certainty, but such a certainty as excludes every reasonable hypothesis creating a doubt.

Exception allowed.

Mr. RAY.—Both defendants except the long instruction given by your Honor, which is numbered 8, next to the last clause reading: "You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing," which should be stricken, the whole instruction reading as follows:

"If you find from the evidence that the defendants, or either of them, furnished or aided in furnishing the transportation that brought the girls from Seattle to Anchorage, and caused it to be delivered to the girls for [203—190] that purpose, the only remaining question for you to determine is the purpose or intent either defendant had in mind at the time of securing or aiding to secure said transportation; that is, did either defendant in so securing or aiding to secure said transportation, if you find that either defendant, or both, did secure or help to secure the same, have

in mind the intent to bring said girls or either of them to Alaska with the purpose to induce, entice or persuade said girls, or either of them, to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice. If you find beyond all reasonable doubt that said defendants, or either of them, did bring or aid in bringing said girls to Alaska from Seattle for any of the unlawful purposes named, then you will find such defendant or defendants guilty upon the count or counts which you so find to be proved beyond all reasonable doubt.

But unless you do so find beyond all reasonable doubt that the defendants, or either of them, had such intent at the time said transportation was furnished, you cannot return a verdict of guilty against them, or against the one, if either, who lacked such intent at the time of furnishing said transportation.

If you find from the evidence that the defendants, or either of them, formed the intent and purpose after the girls arrived in Anchorage to persuade them to enter upon any of the unlawful and immoral practices set forth in the indictment, such finding will not authorize a conviction in this case, because the defendants are not charged in the indictment with any unlawful act done or purpose arising after the girls arrived in Anchorage.

All the testimony admitted in the case other than that designed to show that defendants secured or aided in securing the steamship

tickets which were the means of transporting the girls to Anchorage from Seattle was admitted for the sole purpose of showing the intent on the part of the defendants, or either of them, in furnishing said transportation, and it is not to be considered by you for any other purpose. You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing.

If you find that any of the evidence admitted by the court may tend to show that other offenses may have been committed by defendants, or either of them, in or about the Kelly pool-hall or building while the girls were there, such evidence is to be disregarded by you unless you find that it has some bearing upon the question of the intent of defendants in securing said transportation to bring the girls from Seattle to Anchorage, and then it is to be considered only so far as you may find it may affect the question of such intent.

Exception allowed. [204—191]

Mr. RAY.—The defendants except to Instruction Number 11 given by your Honor and reading as follows:

"You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict,

and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust."

Upon the ground that it is not incumbent upon the defendants, or either of them, to prove their innocence or produce any testimony.

Exception allowed.

Mr. RAY.—Defendants except to the refusal of the Court to give Defendants' Requested Instruction #15, reading as follows:

"You are instructed to return a verdict of not guilty on all the counts in the indictment contained as to the defendant, Mrs. Grace Kelly."

Exception allowed.

Mr. RAY.—Defendants except to the refusal of the Court to give Defendants' Requested Instruction #16, reading as follows:

"You are instructed to return a verdict of not guilty on all the counts in the indictment as to the defendant, Frank Kelly."

Exception allowed.

Mr. RAY.—Defendants except to the refusal of the Court to give Defendants' Requested Instruction #20 reading as follows:

"You are instructed that if you find from the evidence that the crime committed as charged in the indictment was committed by Mrs. Grace Kelly at the direction or with the concurrence of her husband, Frank Kelly,

he will be liable for criminal prosecution therefor, and he alone, and that the law will imply that it was committed under his coercion, if done in his presence and with his knowledge.'' [205—192]

Exception allowed.

Mr. RAY.—Defendants except to the modification of Defendants' Requested Instruction #13, as modified by your Honor, in striking therefrom the first five lines; you have given the balance of the instruction,—the Requested Instruction reading as follows:

''You are further instructed that the mere aiding of a person, such as the procuring of a railroad ticket or the lending of money to travel with which to purchase a ticket, does not come under the interstate commerce regulations and is not a violation of the so-called White Slave Act, and if you find in this case that the defendants as a part of their contract of employment simply advanced steamship fare to the Hilkert girls in order to enable them to travel from Seattle, Washington, to Anchorage, Alaska, and there to enter upon their contract of employment as entertainers, then your verdict will be not guilty as to both defendants as to each and every count in the indictment; unless, however, you are satisfied beyond all reasonable doubt that at the time said transportation was provided, if it was so provided, by the defendants to the Hilkert girls, the defendant,

Frank Kelly, and the defendant, Mrs. Grace Kelly, furnished such transportation with the intent then and there to induce and entice the said Mildred Hilkert and Margaret Hilkert to become prostitutes and to give themselves up to debauchery and to engage in other immoral practices."

Exception allowed.

Mr. RAY.—Defendants except to the refusal of the Court to give Defendants' Requested Instruction #32, reading as follows:

"You are instructed that contracts of employment, and other contracts, may be entered into by and through the means of telegraphic correspondence, that is to say, an offer of employment, made by telegraphic or cable communication, may be accepted by such means or mode of communication; and if you find, from a consideration of all the testimony submitted, that the Misses Hilkert came to Alaska in consequence of and in accordance with the telegraphic offer of the defendant Frank Kelly, and by the acceptance of such offer as embodied in said telegraphic or cable communication bound themselves to repay to the defendant Frank Kelly the cost of the transportation on the basis of a weekly deduction from the salary contracted to be paid, then, and in that event, you must find the defendant Frank Kelly, 'not guilty' as to all the counts in the indictment contained, for the reason that lending money with which to enable an-

other to travel, or to purchase transportation, does not come under interstate commerce regulations, and [206—193] is not a violation of the so-called White Slave Act."

Exception allowed.

Mr. RAY.—Defendants except to the refusal of the Court to give Defendants' Requested Instruction #23, reading as follows:

"You are instructed that if the Government adduced testimony as to isolated incidents that tended to show the atmosphere of the place where the girls worked, the same should not be considered by the jury unless the incidents tended to establish the gist of the charges in the indictment, that is, tended to show that the defendants intended on August 3, 1921, to bring the girls to Anchorage for purposes of prostitution and debauchery; and if the incidents related by the Government witnesses did not so show, the defendants were not required to answer them."

Exception allowed.

WHEREUPON, the jury retired to deliberate on their verdict.

Case closed. [207—194]

I do hereby certify that I am the Official Court Reporter for the Third Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit: United States of America versus Frank Kelly and Mrs. Grace Kelly, No. 836 Criminal; that the foregoing transcript is a full, true and correct

transcript of the evidence introduced and the proceedings had at the trial of said cause.

Dated at Valdez, Alaska, this, the 25th day of May, 1922.

I. HAMBURGER. [208—195]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY and MRS. GRACE KELLY, Defendants.

Verdict.

We, the jury, duly impaneled and sworn in the above-entitled cause, do upon our oaths find the defendant Frank Kelly Guilty upon all the counts of the indictment; and the defendant Mrs. Grace Kelly Not Guilty upon all the counts of the indictment, and recommend the clemancy of the Court for the defendant Frank Kelly.

Dated at Anchorage, Alaska, February 25th, 1922.

D. H. WILLIAMS, Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 25, 1922. W. M. Cuddy, Clerk. [209]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY.

Motion for Arrest of Judgment.

Comes now the defendant above named by his counsel and moves that no judgment be rendered upon the verdict of guilty of violation of the White Slave Traffic Act returned into court by the jury in the above-entitled cause at Anchorage, Alaska, upon the twenty-fifth day of February, 1922, at the regular term of court held thereat upon the grounds and for the following reasons, to wit:

I.

That all of the facts set out and contained in the indictment as brought by the grand jury convened for the Territory of Alaska, Third Division thereof, at the regular term of the District Court for said Territory and Division at Valdez, Alaska, in which Frank Kelly was indicted for the violation of the White Slave Traffic Act, are contained in Count 1 of said indictment; that any crime, if committed, was alleged in Count 1 of said indictment; and that all other counts, namely: Counts 2, 3, 4, 5, 6, 7, and 8 charge the same crime in varying language; that any verdict rendered is

purely and absolutely cumulative and contrary to law.

II.

That the evidence, and the whole thereof, was not sufficient in law upon which a verdict of guilty could be predicated.

III.

That the Trial Court refused to admit testimony offered by the defendant, and to which refusal proper exceptions were taken at the time, which testimony was offered then and there to disprove material allegations of the Government. [210]

IV.

That the Trial Court admitted testimony offered by the Government, to which exceptions were properly and duly taken by the defendant, which testimony was prejudicial to the interests of the defendant and tended to prejudice the minds of the jury as to the real issues involved.

V.

That testimony admitted by the Trial Court over the objections of the defendant tended to confuse the minds of the jury in that it tended to prove other crimes, not charged in the indictment, and which defendant could not have been called upon to meet in this cause.

MURPHY & COFFEY,
L. V. RAY,
Attorneys for Defendant.

True copy of the above and foregoing motion for arrest of judgment admitted by me, U. S. District

Attorney for the Third Division, Territory of Alaska, this 27th day of February, 1922.

HARRY G. McCAIN,
Asst. U. S. District Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 27, 1922. W. N. Cuddy, Clerk. [211]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA
vs.
FRANK KELLY.

Motion for New Trial.

Comes now the defendant above named, by his counsel, and moves that the verdict returned into court by the jury empaneled in the above cause finding the defendant guilty of violation of the White Slave Traffic Act to be set aside and a new trial be granted to said above-named defendant for the reasons and upon the following grounds, to wit:

I.

The insufficiency of the evidence to justify the verdict and that such verdict was against the law.

II.

Errors in law occurring at the trial of the cause and duly and timely excepted to by the defendant during the trial of said cause.

III.

The improper, irregular and unjustifiable conduct on the part of one of the jurors in that above-entitled cause in that he was permitted to be separated from the remaining jurors at a time subsequent to the charge and instructions by the Court to the jury and prior to a rendition of the verdict in open court; that during a time between the charge and instructions of the Court to the jury, and the rendering of the jury's verdict in open court, one of the jurors selected and empanelled in the above-entitled cause was permitted to become separated from the jury body, and while so separated to walk a distance of approximately six hundred (600) feet on the public and open streets of Anchorage, Alaska, between the place designated by the Court for the deliberations of the jury selected and empanelled in the above-entitled cause and the place at which the [212] above-entitled court was then and there holding its regular sessions; that such separation as mentioned aforesaid is in clear violation of Section 1024 of the Compiled Laws of the Territory of Alaska, 1913, wherein it is provided, in part, as follows:

> "After hearing the charge the jury may either decide in the jury-box or retire for deliberation. If they retire they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the utmost of his ability,

keep the jury thus together separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberation or the verdict agreed on."

Ia.

That testimony was admitted on the part of the Government over the timely objection of the defendant which tended to prove defendant guilty of various crimes not charged in the indictment. That such testimony offered and amended as aforesaid tended to prejudice the minds of the jury against the defendant and inferentially and by dangerous innuendo required defendant to answer charges, crimes and infractions of the law of which he had no notice by this indictment and with which he has not been charged.

Ib.

That testimony was admitted by the trial court adduced on the part of the Government over the timely objections of the defendant which by reason of its remoteness in point of time and place and circumstance from the crime charged in the indictment was clearly inadmissible; that the admission of such testimony was prejudicial to the interests of the defendant in the minds of the jurors as tending to confuse in their minds the real issues involved.

Ic.

That no testimony should have been offered and, if [213] offered, received by the Trial Court which would prove or which might prove the commission of any crimes or the infraction of any law not charged by this indictment against the said defendants.

Id.

That testimony as adduced by the Government was admitted by the Trial Court over the frequent, energetic and timely objections of the defendant which tended to prove wilful, malicious and felonious intent on the part of the defendant at the time when the Government alleges and states that he sent to places outside of the Territory of Alaska for certain entertainers and who later came to the Territory for the purpose of entertaining, and which intent was sought to be proven by testimony adduced by the Government proving facts too remote in point of time, persons, presence and circumstances which could be properly identified with the crime charged in the said indictment.

IIa.

That the Trial Court erred in admitting or receiving any testimony adduced by the Government over the timely objections of the defendant which tended to prove intent at any other time than the specified time when as alleged the defendant entered into negotiations whereby certain females were brought from places outside of the Territory into the Territory, to work as legitimate entertainers in defendant's place of business at Anchorage, Alaska, said negotiations having

been initiated on the first of August, 1921, and terminated on the third day of August, 1921.

IIb.

That the Trial Court erred in receiving or admitting any testimony regarding any person, incident, circumstance, happening or fact that did not tend to prove this specific intent.

IIc.

That testimony tending to prove such intent by alleged facts, persons, documentary evidence, happenings and [214] circumstances unconnected by remoteness of time with the crime charged were admitted by the trial court over the strenuous and timely objections of the defendant.

IId.

That testimony was admitted and received by the Trial Court over the timely objections of the defendant which was of a privileged and sacred character and which was offered by the United States District Attorney, Sherman Duggan, attorney for the United States in the above-entitled action; that the testimony offered was concerned with the privileged communication as defined by all elementary and statute law, such communication being between the defendant, Frank Kelly, client, and Sherman Duggan, attorney at law, duly admitted to and authorized to practice law in all of the courts of the Territory of Alaska, during the year 1921; that such privileged communication was testified to by the said Sherman Duggan, who, since the time of being consulted by the defendant, has been appointed and now is acting United States District

Attorney for the Third Division, Territory of Alaska; that such testimony was offered, received and admitted over and in the face of the violent and timely objections on the part of the defendant, who offered such objections upon the ground and for the reasons that no communication of this privileged nature and character should be or could be admitted in evidence in this trial over the objections and without the consent of the defendant, Frank Kelly.

IIe.

That misconduct on the part of one of the Government's attorneys, to wit, Julian Hurley, Assistant, prejudiced the minds of the jurors by his reference to testimony which was not permitted by the Court in the trial of the cause, i. e., that the said Hurley in addressing the jury said in effect that the girls, referring to the Government's prosecuting witnesses, were brought to Alaska for the purpose of selling liquor to the patrons of the [215] Kelly pool-hall and that the testimony in the case proved that the girls sold liquor and delivered it to the patrons of the said Kelly pool-hall; that such misconduct on the part of the said Assistant District Attorney tended to inflame and prejudice the minds of the jurors against the defendant.

MURPHY & COFFEY,
L. V. RAY,
Attorneys for Defendant.

True copy of the above and foregoing motion for new trial admitted by me, U. S. District Attor-

ney for the Third Division, Territory of Alaska, this 27th day of February, 1922.

HARRY G. McCAIN,
Assistant U. S. District Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 27, 1922. W. N. Cuddy, Clerk. [216]

In the District Court for the Territory of Alaska.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK KELLY,
Defendant.

Affidavit in Support of Motion for New Trial.

United States of America,
Territory of Alaska,—ss.

Grace Kelly and Frank Kelly, being first duly sworn, separately and upon their oaths depose and say: That each is well acquainted with one Fred Waller, formerly of Anchorage, Alaska, but now outside of the Territory of Alaska; that the said Fred Waller is and was an important witness in the trial of the case of the United States vs. Frank Kelly and Grace Kelly; that prior to the commencement of said trial these affiants consulted with their counsel with reference to securing the pres-

ence of the said Fred Waller at the trial of the cause last above mentioned; that counsel at the time of said consultation informed these affiants that the presence of said Waller was necessary; that thereafter, and acting upon the advice of counsel, these affiants tried to find out the whereabouts or residence of the said Fred Waller so that a subpoena could be served upon him or his presence secured for attendance in said trial; that the efforts of these affiants were unavailing and at said time the said residence of Fred Waller could not be ascertained; that since the trial of said cause these affiants have ascertained the residence of the said Fred Waller, and that the said Fred Waller's presence can be secured if a new trial should be granted in the above-entitled cause; that if the said Fred Waller had been present at the recent trial he would have testified to the following effect: [217]

"THAT at the time the said Fred Waller, in Anchorage, Alaska, recommended Mildred and Margaret Hilkert to these affiants, that he, the said Fred Waller, was asked by both these affiants if the said Hilkert girls were good girls and that these affiants did not desire to have any girls work for them who were not of the best character; that affiants did not want girls who might become sporty or immoral as it had always been their experience that the latter-named class of girls were usually unsatisfactory employees; that if the said Fred Waller was present at said trial he would testify to the above conversation in effect and that he at

said time and place stated that the girls were absolutely good; that they were discreet and that these affiants would have no trouble with them if they were employed; that the said Margaret and Mildred Hilkert in answer to a question propounded to them on cross-examination in the trial of the case testified in effect: That they had only met the said named Fred Waller on one occasion at a friend's house; that if the said Fred Waller was present and testifying he would testify that he had frequently visited the said girls in their apartments and had frequently taken lunch with them in their apartments; that the class of testimony introduced in the trial of the cause herein mentioned was of such a nature that the same could not have been anticipated by these affiants, their counsel or anyone interested in the defendant's proper defense of their case, and that both affiants and counsel were wholly surprised by the nature of the same, further affiants sayeth not.

GRACE KELLY.
FRANK KELLY.

Subscribed and sworn to before me this 28th day of February, A. D. 1922, at Anchorage, Alaska.

JOHN F. COFFEY,
Notary Public for Alaska.

My commission expires May 13th, 1925.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 28, 1922. W. N. Cuddy, Clerk. J. Hamburger, Deputy. [218]

In the District Court for the Territory of Alaska,
Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Affidavit in Support of Motion for New Trial.

United States of America,
Territory of Alaska,—ss.

J. C. Murphy, being first duly sworn, upon his oath deposes and says: That he is a citizen of the United States and a resident of Anchorage, Alaska, over the age of twenty-one years; that he was one of the attorneys for the defendants in the case of the United States of America versus Frank Kelly and Grace Kelly charged with that violation of the Act of Congress commonly called the Mann Act; that during the selection of the jury to try the above-entitled case one D. H. Williams, of Anchorage, Alaska, was examined as a juror to try the above-mentioned cause; that during the examination of the said juror D. H. Williams he was asked in effect the question whether he had any bias or prejudice against the defendants or either of them and that said Juror D. H. Williams in answer to said question propounded to him answered in effect that he had no bias or prejudice

against the defendants or either of them; that relying upon the statement of the said Juror Williams he was accepted on the part of the defendants to try the said case; that since the trial of this case it has come to the knowledge of this affiant that during the fall of 1921, at about the time that the investigation was instituted which led up to the prosecution of these defendants that the said D. H. Williams in company with other people of Anchorage held a meeting at which the question was discussed of appealing directly to Governor Bone of Juneau, Alaska, to enforce certain laws which said persons believed were not being enforced in the City of Anchorage; [219] that at said time and place and in said discussion, with the said Juror Williams present, the business place and the business conducted by the defendant herein was discussed and that all including the said Juror Williams agreed that the same was a nuisance, a menace to the morals of the City of Anchorage and that the same should be closed and the proprietor prosecuted; that the said Juror D. H. Williams was biased and prejudiced against the said defendants and that if the true state of the said juror's mind was known to the defendants, his counsel or to the Court the said juror would not have been permitted to sit as a juror in the trial of said cause.

J. C. MURPHY.

Subscribed and sworn to before me this 28th day of February, 1922.

JOHN F. COFFEY,
Notary Public for Alaska.

My commission expires May 13, 1925.

Service of a copy of the foregoing affidavit, together with copies of the affidavit of Frank Kelly and Grace Kelly and the affidavit of John F. Coffey are hereby admitted this 28th day of February, 1922.

SHERMAN DUGGAN,
U. S. Dist. Atty., 3d Div. of Alaska.
By JULIENAS HURLEY,
His Assistant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 28, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [220]

In the District Court for the Territory of Alaska, Third Division.

No. ——.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK KELLY and GRACE KELLY,
Defendants.

Affidavit of Misconduct of Juror.

United States of America,
Territory of Alaska,—ss.

John F. Coffey, being first duly sworn, upon his oath deposes and says: That he is a citizen of the United States and a resident of Anchorage, Alaska;

that he is well acquainted with one D. H. Williams; that the said D. H. Williams to this affiant's personal knowledge was selected as a juror in the United States District Court for the Third Division, Territory of Alaska to try the above-entitled case; that the said D. H. Williams was one of the said jurors who heard the testimony in the case; the arguments of counsel and the instructions of the Court and was present when the Clerk of Court read Section 1024 of the Compiled Laws of Alaska to the bailiffs who were to have said jury in charge and swear them to be guarded strictly by its provisions; that notwithstanding the law in the premises the said D. H. Williams did on the 25th day of February, 1922, at about the hour of noon of said day, leave and absent himself from his fellow jurors and go a long distance, to wit; from the old Elks Building to the Court house in Anchorage, Alaska, a distance of approximately 600 feet; that the route traversed by said D. H. Williams in going to and from the place where his fellow-jurors were in session is the principal thoroughfare in the city of Anchorage in the said city and that there was ample opportunity for the said Williams to converse with various people while on said trip; that this affiant saw the said D. H. Williams while making said trip on the date and at the time herein mentioned and that he was not [221] accompanied by any of his fellow jurors. That the said jury were in charge of two bailiffs and that it was absolutely unnecessary for the said D. H. Williams to make such trip; that in making

such trip the said D. H. Williams had received no instruction or permission of the Court although the said Court was then in session and available to the jury at all times through the bailiffs in charge.

JOHN F. COFFEY.

Subscribed and sworn to before me this 28th day of February, 1922.

J. C. MURPHY,
Notary Public for Alaska.

My commission expires June 10, 1922.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 28, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [222]

In the District Court for the Territory of Alaska, Third Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Affidavit of Frank Kelly.

United States of America,
Territory of Alaska,—ss.

Frank Kelly, being first duly sworn, upon his oath deposes and says that he is the defendant above named; that late yesterday, March first, 1922, he

got into conversation with one N. O. Mullino of Anchorage, Alaska, that the said Mullino was a passenger on the S. S. "Alameda" on her trip to Alaska, on which the Misses Margaret and Mildred Hilkert first came to Anchorage; that the said N. O. Mullino made the accompanying affidavit of the conduct of the said girls while passengers on said trip; that the said N. O. Mullino signified his willingness to act as a witness in the part of the defendant if a new trial should be granted to him and that he believes that such testimony would be of great importance to show the character of the Government's principal witnesses and the weight that could be placed upon their testimony; that the evidence of the said N. O. Mullino could not be secured at the first trial.

FRANK KELLY.

Subscribed and sworn to before me this 2d day of March, 1922.

J. C. MURPHY,
Notary Public for Alaska.

My commission expires March 10, 1922.

Service accepted March 2d, 1922.

JULIENAS HURLEY,
Assist. U. S. Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 2, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [223]

Affidavit of N. O. Mullino.

Territory of Alaska,
Knik Precinct,—ss.

N. O. Mullino, being first duly sworn, on oath deposes and says:

That about the 10th day of August, 1921, deponent left Seattle, State of Washington, and embarked on the steamship "Alameda" en route for Anchorage, Alaska. That among the passengers on said boat were two girls who were known on said boat as Margaret and Mildred, but whose full names are not known to deponent, but who were en route for Anchorage, Alaska, and who, upon arrival in said Anchorage, were engaged in singing, playing, dancing and entertaining in that certain pool-hall and amusement resort known as Ragtime Kelly's in said Anchorage. That while en route on said boat, and on one afternoon deponent went to his stateroom on said boat and there found the girl above mentioned named Mildred in company with the room-mate of the deponent, a commercial traveler known as Benny, whose full name is unknown to deponent. That when seen by deponent at this time in the stateroom of deponent said room-mate of deponent known as Benny was laying on the bed in said stateroom without any clothes and in a completely naked condition, and without any covering of bedclothes or other covering whatever, and said girl Mildred was laying on the bed with said Benny, dressed in her

usual apparel. That deponent was then asked to have a drink of whiskey by said occupants of said room above mentioned, which deponent accepted and immediately left said room.

That while en route on said boat, as aforesaid, deponent and the room-mate of deponent, Benny, were invited by said two girls before mentioned to the stateroom occupied by said girls to take a drink of whiskey, at about 8 o'clock in the evening, and while there said girl above mentioned named Margaret said to said Benny, "How would you like to see my ass?" to which said Benny replied in the affirmative, and then said Margaret raised her dress and exhibited [224] the bare skin of her buttock, upon doing which said Benny pinched her there with his fingers.

In witness whereof deponent has hereunto subscribed his name this 1st day of March, 1922, at Anchorage, Alaska.

N. O. MULLINO.

Subscribed and sworn to before me this 1st day of March, 1922.

ARTHUR G. THOMPSON,
Notary Public.

My commission expires May 6th, 1922.

Copies of the foregoing affidavit and accompanying affidavit of Frank Kelly is hereby admitted this 2d day of March, 1922.

JULIENAS HURLEY,
Assist. Dist. Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 2, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [225]

In the United States District Court, District and Territory of Alaska, Third Division. No. 836—Criminal. United States vs. Frank Kelly and Mrs. Grace Kelly. Affidavit of L. B. Horton in Opposition to Defendant's Motion for New Trial.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 1, 1922. W. N. Cuddy, Clerk. [226]

No. 836—CRIMINAL.

UNITED STATES

vs.

FRANK KELLY.

Affidavit of L. B. Horton in Answer to Defendant's Motion for New Trial.

L. B. Horton, being first duly sworn, deposes and states: That he is a citizen of the United States over the age of twenty-one years; that he has served as bailiff during the present term of court at Anchorage, Alaska, said duties being begun on the 14th day of February, A. D. 1922, and continuing until the present time; that he was sworn to act as bailiff during the deliberations of the trial jury in the case of the United States versus Frank Kelly and Mrs. Grace Kelly, and that he did so act.

Affiant further states that at about eleven-

fifteen o'clock A. M. on the twenty-fifth day of February, 1922, while the said jury was deliberating in said case at the Elk's old temple, some member of the said jury signalled for a bailiff as was according to custom and instructions; that affiant answered the signal and asked, according to law and instructions, whether or not the jury had arrived at a verdict; that affiant was informed that a verdict had been reached. Affiant further states that D. H. Williams expressed the desire of having a bailiff accompany him, the said D. H. Williams, to the United States courtroom to secure some papers; that affiant did so accompany the said D. H. Williams that during said trip to and from the said courtrooms the affiant was with and in charge of the said D. H. Williams at all times and that at no time did the said D. H. Williams converse with any person upon the subject of the trial or verdict or deliberations in said case or upon any other subject; that at no time was the said D. H. Williams at a greater distance from affiant than about six feet. Affiant further states that the remaining eleven jurors were left in charge of Bailiff Dietrich.

L. B. HORTON.

Subscribed and sworn to before me this 28th day of February, 1922.

HARRY G. McCAIN,
Notary Public for Alaska.

My commission expires on August 29th, 1925.
[227]

Due service of the foregoing affidavit is hereby accepted this 1st day of March 1922.

JOHN F. COFFEY.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 1, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [228]

In the United States District Court for the District and Territory of Alaska Third Division. No. 836—Criminal. United States vs. Frank Kelly and Mrs. Grace Kelly, Defendants. Affidavit of M. W. Diedrick, in Opposition to Defendant's Motion for a New Trial. [229]

No. 836—CRIMINAL.

UNITED STATES

vs.

FRANK KELLY and MRS. GRACE KELLY,
Defendants.

Affidavit of M. W. Diedrick in Opposition to Defendant's Motion for a New Trial.

M. W. Diedrick, being first duly sworn, deposes and states: That he is a citizen of the United States, residing at Anchorage, Alaska, and that he is over the age of twenty-one years; that on the 25th day of February, 1922, affiant was sworn to act as bailiff during the deliberations of the trial jury in the case of United States versus Frank Kelly and Mrs. Grace Kelly, and that he did so act.

Affiant further states that at about eleven-fifteen A. M., on the 25th day of February, while the trial jury in said case was deliberating on said case at the Elks old temple, affiant and bailiff Horton were notified by D. H. Williams that he, the said D. H. Williams, desired to go to the United States Courtrooms for the purpose of securing some papers which had been left there; that bailiff Horton left said Elks building in charge of said D. H. Williams. and also returned to said building in charge of said Williams. Affiant further states that during all the time said Williams and bailiff Horton were absent from said building, which time was approximately 20 minutes, affiant was in charge of the remaining eleven members of said jury; that neither during time said Williams and bailiff Horton were absent nor at any other time were the members of said jury allowed to converse or communicate with any person or persons other than themselves.

M. W. DEIDRICK.

Subscribed and sworn to before me this 28th day of February, 1922.

HARRY G. McCAIN,
Notary Public for Alaska.

My commission expires on August 29th, 1925.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 1, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [230]

Due service of the foregoing affidavit is hereby accepted this 1st day of March, 1922.

JOHN F. COFFEY. [231]

In the United States District Court, District and Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES

vs.

FRANK KELLY and MRS. GRACE KELLY.

Affidavit of D. H. Williams in Answer to Defendant's Motion for New Trial. [232]

United States of America,
Territory of Alaska,
City of Anchorage,—ss.

D. H. Williams, being first duly sworn, deposes and states: That he is a citizen of the United States and a resident of the City of Anchorage, Alaska, and over the age of twenty-one years; that he was summoned to serve on the regular panel of jurors in the United States District Court for the Territory and District of Alaska, Third Division at Anchorage, on the fourteenth day of February, A. D. 1922; that he appeared on that day in the said court and was qualified and sworn to serve on said panel.

Affiant states further that he was called, qualified, accepted, and sworn to serve on the trial jury in said court in the case of the United States vs. Frank Kelly and Mrs. Grace Kelly, said case being Criminal Case No. 836 on the Criminal Docket of said Court; that he did so serve and that he was chosen and acted as foreman of said jury; affiant states further that said trial jury did by

their verdict find the defendant Grace Kelly "not guilty" on all counts, and the defendant Frank Kelly "guilty" on all counts; that during the deliberations in said case the members of said jury were never separated but were kept strictly together until after a verdict had been agreed on by all the members of the jury; that when the jury were moved from said courtroom to the Elks old building proper forms of verdict were inadvertently left at the United States Courtroom in Anchorage; that affiant, accompanied by a bailiff, after the verdict was reached and agreed to by all the members of the jury, went to said courtrooms and got the verdict forms upon which to submit the verdict of said jury; that during the time affiant was so doing he conversed with no person in reference to the deliberations or verdict of said jury; that during the time that affiant was away from the other members of the jury said other members were also [233] in the charge of a bailiff. Affiant therefore states that, to his knowledge, no harm or prejudice was done to the defendants or either of them on account of said transaction.

D. H. WILLIAMS.

Subscribed and sworn to before me this 27th day of February, A. D. 1922.

HARRY G. McCAIN,
Notary Public for Alaska.

My commission expires Aug. 29, 1925.

Due service of the foregoing affidavit is hereby accepted this 1st day of March, 1922.

JOHN F. COFFEY.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 1, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [234]

In the United States District Court, District and Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY and MRS. GRACE KELLY.

Affidavit in Answer to Defendant's Motion for a New Trial.

United States of America,
Territory of Alaska,—ss.

I, D. H. Williams, being first duly sworn, upon oath, depose and say:

That I have read the affidavit of J. C. Murphy filed in the above-entitled court and cause in support of a motion filed on behalf of the above-named defendant Frank Kelly for a new trial; that I was not biased or prejudiced against said defendants or either of them at the time I was accepted as a juror in the above-entitled action and had no opinion as to the guilt or innocence of the said defendants or either of them at the time I was so accepted as a juror in this case; that I never attended a meeting during the fall of 1921 at which I discussed and agreed that the business place and the business

conducted by the defendants or either of them was a nuisance or a menace to the morals of the City of Anchorage or that the same should be closed or the proprietor prosecuted; that I never attended a meeting of any kind in the fall of 1921 at which the question of appealing to Governor Bone was discussed; that I never attended any such meeting as set forth and described in the said affidavit of the said J. C. Murphy.

D. H. WILLIAMS.

Subscribed and sworn to before me this 1st day of February, 1922.

W. N. CUDDY,
Clerk of Court.
By J. Hamburger,
Deputy. [235]

Service accepted this 2d day of March, 1922.
JOHN F. COFFEY.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 2, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [236]

Journal No. A–2.

District Court, Territory of Alaska, Third Division.
Page 231.

November 28, 1921, Term of Court, Anchorage, Alaska, March 2, 1922—29th Court Day.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Decision on Motion for New Trial and on Motion for Arrest of Judgment.

Now, on this day, this matter came before the Court, on the motion of defendant for a new trial and his motion for arrest of judgment, same having been previously argued and taken under advisement by the Court:

The Government was represented by Julien Hurley, Esq., Assistant United States Attorney, the defendant was personally present and represented by his attorneys Messrs. Murphy & Coffey: WHEREUPON—

IT IS ORDERED that defendant's motion for a new trial and defendant's motion for arrest of judgment be and the same hereby are denied.

It is further ORDERED that Friday morning at ten o'clock, March 3, 1922, be and the same is hereby fixed as the time when the said defendant shall receive his sentence on the verdict of Guilty returned by the Jury in said cause.

To which the defendant excepted and the exception was allowed by the Court. [237]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Judgment and Sentence.

Comes now the United States Attorney, by his Assistant Julien Hurley, Esq.; came also the defendant in person and by his attorneys Messrs. Murphy & Coffey:

And it appearing to the Court that the defendant herein was heretofore, to wit, on the 25th day of February, 1922, found guilty of the crime of causing girls to be transported in interstate commerce for the purposes of prostitution:

And the defendant being asked if he has anything to say why the sentence of the Court should not now be pronounced on the said verdict of guilty and answering nothing in that behalf:

IT IS ORDERED, That you, Frank Kelly, defendant in above cause, be imprisoned in the Federal Jail at Anchorage, Alaska, for the period of nine months on each of the eight counts of the indictment in this cause, the said sentences on all of the eight counts to run concurrently, and that you

be committed to the custody of the United States Marshal for the Third Division, Territory of Alaska, until such sentences are fully satisfied.

Dated at Anchorage, Alaska, March 3, 1922.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division Mar. 30, 1922. W. N. Cuddy, Clerk. I. Hamburger, Deputy. [238]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Statement of Court in Explanation of Sentence.

The White Slave Traffic Act provides that any person guilty of any of the practices denounced by the law "shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine not exceeding Five Thousand Dollars or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court." As a violation of the Act is expressly made a felony, that might seem to imply that in case the sentence includes imprisonment, the place of confinement should be a penitentiary, but as the Act does not require imprisonment as the

penalty, or part of it, it is fair to assume that the place of imprisonment, if any, is prescribed by the sentence, is left to the discretion of the Court.

In this case the jury recommended the defendant to clemency. It is also the opinion of the Trial Judge that it is at least doubtful whether the evidence was sufficient to justify a verdict of guilty against the defendant.

For these reasons the Court fixes the penalty at imprisonment in the Federal Jail at Anchorage, Alaska, rather than in the penitentiary at McNeil's Island. [239]

In the District Court for the Territory of Alaska,
Third Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Motion to Vacate Judgment and Sentence.

Comes now the above-named defendant, Frank Kelly, and moves the above-entitled court to vacate the sentence and judgment heretofore rendered and pronounced in said cause, ——, in that said judgment and sentence; based upon the verdict of a jury impaneled in said cause, was and is void.

This motion is based upon the records and files in said cause, and upon the affidavits of Charles A. Coates, Jeremiah C. Murphy, Mrs. Grace Kelly

and Father —— Markham, which affidavits accompany this motion and are made a part thereof.

Dated at Anchorage, Alaska, this 30 day of September, 1922.

L. V. RAY and
J. C. MURPHY,
Attorneys for Defendant Frank Kelly.

Service of a copy of the foregoing notice together with copies of the affidavits of Charles A. Coates, Mrs. Grace Kelly and Jeremiah C. Murphy in support of same is hereby admitted this 30th day of September, 1922.

SHERMAN DUGGAN,
U. S. Dist. Attorney of Alaska.
By JULIENAS HURLEY,
His Assistant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sept. 30, 1922. W. N. Cuddy, Clerk. By Robert S. Bragaw, Deputy. [240]

In the District Court for the Territory of Alaska, Third Division.

No. ——.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK KELLY,
Defendant.

Affidavit of Charles A. Coates.

United States of America,
Territory of Alaska,—ss.

Charles A. Coates, being first duly sworn, upon his oath deposes and says: That he is a citizen of the United States and a resident of Anchorage, Alaska, over the age of twenty-one years; that he is well acquainted with one D. H. Williams who conducts an undertaking establishment in the City of Anchorage, Alaska; that the said D. H. Williams served as a trial juror in a case in the District Court of Anchorage, Alaska, tried during the February Term of 1922, in which the said above-named defendant together with said defendant's wife, one Grace Kelly were tried for the offense commonly known as the "White Slave Traffic Act," Chapter 14 of the Criminal Statutes, Compiled Laws of Alaska, which said trial resulted in a verdict of acquittal against the said Grace Kelly and one of conviction against the said Frank Kelly; that this affiant was well acquainted with the said D. H. Williams, in Portland, Oregon, on or about the years 1903 and 1904; that the said D. H. Williams, above referred to was at that time acting as Secretary for the "Leather Workers Union"; that while acting as in said capacity, he, the said D. H. Williams, embezzled certain funds belonging to the said above-named organization; that this affiant was a member of the said same Union at this said time; that the said D. H. Williams was thereafter apprehended and sentenced to serve a term in the

that the crime for which the said D. H. Williams Oregon State Penitentiary located at Salem, Oregon; served in the said institution at Salem, Oregon, was a felony, but whether the said D. H. Williams was tried for said offense or plead guilty to the charge this affiant is unable to say; that this affiant is positive in his statements and that he recognized the said D. H. Williams as one and the same party who was the said Secretary in Anchorage, Alaska; further affiant sayeth not.

CHARLES A. COATES.

Subscribed and sworn to before me this 19th day of August, 1922.

J. C. MURPHY,
Notary Public for Alaska.

My commission expires June 10th, 1926. [241]

In the District Court for the Territory of Alaska, Third Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Affidavit of Mrs. Grace Kelly in Support of Motion to Vacate Judgment.

United States of America,
Territory of Alaska,—ss.

Mrs. Grace Kelly, being first duly sworn, on oath deposes and says: That she is the wife of the de-

fendant Frank Kelly, above named; that she was a codefendant in the trial of the cause, which trial was held at Anchorage, Alaska, in the latter part of the month of February, 1922, at a term of the District Court of the Territory of Alaska, Third Division, at which Honorable E. E. Ritchie presided as Judge and a jury was selected and impaneled; that said trial resulted in a verdict of "Not Guilty" as far as this affiant is concerned; that the defendant Frank Kelly was found "Guilty" upon all the eight counts that said indictment contained; that said verdict so rendered was a result of passion and prejudice and was not a fair and impartial verdict. That of the jurors one D. H. Williams qualified and in response to questions propounded to him by counsel respectively for the defendant and for the Government stated that he the said Williams had no information or knowledge of any fact relative to the offense or offenses charged against the said defendants Kelly, had expressed no opinion, had formed no opinion and was without prejudice as to either the defendants or the Government of the United States; that the said Juror Williams had been interrogated by a member of the United States Attorney's office and asked whether or not he had ever been convicted of a felony, and in response to said inquiry replied in the negative; that since the trial of said [242] cause and the entry of judgment upon the verdict of said jury this affiant has ascertained that the said D. H. Williams was either convicted of a felony or plead guilty to the commission of a felony and was sentenced to serve a period of one to five years

in the Oregon State Penitentiary at Salem, Oregon, and that in execution of said sentence the said Juror D. H. Williams did serve at said penitentiary for a period of one year at least; that in an effort to verify the information thus obtained affiant caused to be sent forward to the United States Attorney's office for the Third Division, Territory of Alaska, a certain photograph of the said D. H. Williams for the purpose of identification; that said photograph affiant has been informed by a member of said United States District Attorney's office has been received but affiant has been unable to obtain such photograph or be permitted to have identification made of the said D. H. Williams with the subject of said photograph; that the record of said conviction as shown by the prison register is as follows:

"Name—Williams, D. H. Prison No. 6062.
Alias
County—Multnomah.
Crime—Lcy. by embezzlement.
Received—January 17, 1910.
Min. Sent. Expires—January 17, 1911.
Sentence—5 years.
Ind't Sentence—1 to 10 years.
Occupation—Leather Worker.
Sentencing Judge—John B. Cleland.
Prosecuting Attorney—J. J. Fitzgerald, Deputy.
Sheriff—F. L. Stevens.
Prior ————————.
(Parole Form 2)

Over.

(Reverse Side.)

Paroled June 15, 1911.

4–24–13 Rec. that citizenship be restored."

That affiant has also ascertained and therefore states upon oath that prior to the latter part of August in the year 1921 and prior to the date upon which it is alleged the defendants caused transportation to be furnished to the prosecuting [243] witnesses who testified in said cause, that at a meeting held at the office of said D. H. Williams at Anchorage, Alaska, at which were present the Reverend Mr. Marple, Pastor of a Church in Anchorage, Alaska, the Reverend Father Markham, Pastor of a church in Anchorage, Alaska, the Reverend Mr. Hughes, Pastor of a Church in Anchorage, Alaska, and D. H. Williams, Superintendent of a Sunday-school at Anchorage, Alaska, a general discussion was had relative to conditions regarding the morality and public health in the town of Anchorage, Alaska; that at said meeting the amusement parlors conducted by the defendant Frank Kelly, known as Robart's Pool Hall, came up for discussion, and as a result of the discussion there had the said D. H. Williams was deputized and authorized by the representatives of civic government at said meeting assembled to ascertain what steps could be taken to condemn or otherwise put out of business said amusement resort so conducted as aforesaid by the said defendant Frank Kelly, upon the ground that same was noisy and tended to disturb the peace and quietude of the

people residing near by; that the said D. H. Williams was a frequent visitor and patron of said place of business so conducted by said defendant Frank Kelly, playing pool and billiards and bowling, and professed extreme friendship toward the defendant Frank Kelly and never at any time expressed to the said defendant Frank Kelly or to affiant that the amusement resort was run in other than an orderly manner and was not at all objectionable to the church people of the town of Anchorage; that affiant is informed by her husband's counsel that a person convicted of a felony cannot sit upon a jury in an Alaskan Court, and the participation of such a person so disqualified as a juror in the trial of the case renders the said trial void.

That your affiant has further information, proof of which she submits in support hereof, that the witness Mildred Hilkert, one of the persons whom it is alleged the defendants [244] Kelly caused to be transported in violation of the "Mann Act" was at the time of said trial a bigamist, being then and there married to two men, that is to say, that the said Mildred Hilkert was married on the 5th day of November, 1921, at Valdez, Alaska, to one Huling F. Bowles, whereas a former marriage had been celebrated by the said Mildred Hilkert, then Mildred F. Graham, on the 18th day of May, 1915, to Albert H. Hilkert, said marriage taking place in the City of Seattle, State of Washington, and that on February 14th, 1922, in the Courts of the County of King, State of Washington, said Albert H. Hilkert filed a suit for divorce against said

Mildred F. Graham Hilkert, and that as far as affiant is able to ascertain said suit for divorce is still pending; that the facts herein stated are evidenced by a copy of the marriage certificate between the said Albert H. Hilkert and Mildred F. Graham, and copy of the marriage certificate between Huling F. Bowles and Mildred Hilkert, which said copies are hereto attached to this affidavit.

MRS. GRACE KELLY.

Subscribed and sworn to before me this 27th day of September, 1922.

_____,

Notary Public for Alaska.

My commission expires Sept. 24, 1925.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sept. 30, 1922. W. N. Cuddy, Clerk. By Robert S. Bragaw, Deputy. [245]

COPY.

No. 46855.

MARRIAGE CERTIFICATE.

No. 50793.

State of Washington,

County of King,—ss.

THIS CERTIFIES That the undersigned a Baptist Minister by authority of a License bearing date the 18th day of May, A. D. 1915, and issued by the County Auditor of the County of King, did on the 18th day of May, A. D. 1915 at the City of Seattle, County and State aforesaid join in LAW-

FUL WEDLOCK Albert H. Hilkert of the County of Ashtobula, Ohio, and Mildred F. Graham of the County of King, with their mutual assent, in the presence of Mrs. G. Greene and M. H. Cushing, Witnesses.

IN TESTIMONY WHEREOF, Witness the signatures of the parties to said ceremony, the Witnesses and myself, this 18th day of May A. D. 1915.

Witnesses:	Parties:	Officiating Clergymen or Officer:
Mrs. G. Greene	A. W. Hilkert.	A. E. Greene.
M. H. Cushing	Mildred F. Graham.	Clergyman
	P. O. Address, Seattle, Washington.	

State of Washington,
County of King,—ss.

I, George A. Grant, County Clerk of King County and *ex officio* Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that the foregoing is a true and correct copy of the original marriage certificate of A. W. Hilkert and Mildred F. Graham as the same appears in Volume A–5, Page 31 of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of the said Superior Court this 27th day of June A. D. 1922.

[Seal] GEORGE A. GRANT,
County Clerk.
By H. C. Gordon,
Deputy. [246]

In the District Court for the Territory of Alaska,
Third Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Affidavit of Jeremiah C. Murphy in Support of Motion to Vacate Judgment.

United States of America,
Territory of Alaska,—ss.

Jeremiah C. Murphy, being first duly sworn, on oath deposes and says: That he is a citizen of the United States, and a resident of the Territory of Alaska, and over the age of twenty-one years; that he was one of the Attorneys for the defendant in the above-entitled case; that he is well acquainted with one of the jurors who sat in said case, D. H. Williams; that the said D. H. Williams had on many prior occasions in Anchorage, Alaska, acted as a juror in the Commissioner's Court; that this affiant had no knowledge at the time the said Juror Williams was selected as one of the jurors to try the above-entitled case that the said Williams had previously thereto served a term in the penitentiary at Salem, Oregon, for a felony committed in the last-named state; that affiant examined said Williams as to his qualifications to act as a juror in the above-entitled case and that the said

Williams stated in said examination that he was not acquainted with the facts concerned in the case and that if he was selected as a juror he would give the defendants a fair and impartial trial; that at the said time of said examination this affiant was not aware of said Williams' prior conviction as above set out and did not learn of said fact until after the verdict in the said case had been reached.

JEREMIAH C. MURPHY.

Subscribed and sworn to before me this 27th day of September, 1922.

LEOPOLD DAVID,
Notary Public for Alaska.

My commission expires Sept. 24, 1925. [247]

Affidavit of Rev. A. J. Markham.

State of Idaho,
County of Bonneville,—ss.

Rev. A. J. Markham, of Idaho Falls, Bonneville County, Idaho, being first duly sworn, upon his oath deposes and says: That during the summer of 1921 he was at Anchorage, Alaska, and was present at a certain meeting held in the said town of Anchorage some time during the summer of 1921, at which meeting there were present besides himself one D. H. Williams, Rev. Marple, Rev. Hughes of the Episcopal Church and Mr. Moyer of the Bank of Alaska, and that at said meeting the question of the sale of intoxicating liquors in Anchorage was discussed; that one of the places where it was said that intoxicating liquors was being sold was that of Ragtime Kelly.

Affiant further states that he is not positive as to the date of said meeting, but it was a short time previous to the visit by the Governor of Alaska to Anchorage during said season.

Dated at Idaho Falls, Idaho, this twenty-eighth day of September, 1922.

REV. A. J. MARKHAM.

Subscribed and sworn to before me this twenty-eighth day of September, 1922.

A. U. SCOTT,

Notary Public, Residing at Idaho Falls, Idaho.

My commission expires June 16th, 1923.

Service of a copy of the foregoing affidavit admitted this 10th day of Nov., 1922.

JULIENAS HURLEY,
Assist. Dist. Attorney.

[Endorsed] Filed in the District Court, Territory of Alaska, Third Division. Nov. 10, 1922. W. N. Cuddy, Clerk. [248]

In the District Court for the Territory of Alaska, Third Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Affidavit of Rev. W. S. Marple.

United States of America,
Territory of Alaska,—ss.

I, W. S. Marple, being first duly sworn, upon oath depose and say that I never attended a meeting at the office or residence of D. H. Williams where the liquor question or the defendant Frank Kelly or his amusement parlor in the City of Anchorage was discussed and I did not attend a meeting in Anchorage, Alaska, at which D. H. Williams, Rev. Markham, Rev. Hughes and Mr. Moyer were present when the question of the sale of intoxicating liquor in Anchorage was discussed or the defendant or his place of business was discussed; that the only meeting at which were present Rev. Hughes and Rev. Markham and myself where the question of the sale of intoxicating liquor in Anchorage was discussed that I remember of attending was a meeting at my home and D. H. Williams was not present at that meeting.

W. S. MARPLE.

Subscribed and sworn to before me this 11th day of December, 1922.

IVA DUGGAN,
Notary Public for Alaska.

My commission expires Sept. 13, 1925.

Due service of a copy of the foregoing affidavit is admitted this 12th day of December, 1922.

RAY & DAVID,
Of Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 12, 1922. W. N. Cuddy, Clerk. [249]

Journal A–3.

District Court, Territory of Alaska, Third Division.

Page 93.

November 10, 1922, Term of Court, Anchorage, Alaska, December 29, 1922—41st Court Day.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Order Denying Motion to Vacate Judgment.

This matter came on for hearing on motion of Leopold David, Esq., and J. C. Murphy, Esq., counsel for defendant, to vacate judgment, the plaintiff being represented by Sherman Duggan, Esq., United States Attorney; the defendant being present in person and represented by Messrs. David and Murphy.

WHEREUPON after argument, the motion was denied.

To which the defendant excepted and the exception was allowed by the Court. [250]

In the District Court, Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Stipulation Regarding Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED by and between Sherman Duggan, United States Attorney, and Aaron E. Rucker, one of the attorneys for defendant, as follows:

1. As to Plaintiff's Exhibit "G," being a steamship ticket issued by the Alaska Steamship Company to Mildred Hilkert, No. 1870, it is agreed that in making up copy of said exhibit on appeal the liability clauses and regulations on face of said ticket regarding presentation of claims, numbered 1 to 17, inclusive, may be omitted from the printed copy of said exhibit.

2. As to plaintiff's Exhibit "H," being a steamship ticket issued by the Alaska Steamship Company to Margaret Hilkert, No. 1871, it is agreed that the liability clauses and regulations for the presentation of claims on the face of said ticket, numbered 1 to 17, inclusive, may be omitted from the copy of said exhibit in making up record on appeal.

3. As to Plaintiff's Exhibit "M," it is agreed that in the copying and printing of such exhibit on appeal the heading of one sheet shall be copied and thereafter it shall only be necessary to copy the entries and lines following message numbers 44, 64, and 96, which said exhibit is the delivery and receipt sheet of the United States Army Telegraph Lines.

Dated at Valdez, Alaska, this 23d day of January, 1923.

SHERMAN DUGGAN,
United States Attorney, Third Division. Territory of Alaska.

AARON E. RUCKER,
One of Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 23, 1923. W. N. Cuddy, Clerk. [251]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Order Regarding Original Exhibits.

This matter came on to be heard by the Court upon the stipulation entered into by and between

Sherman Duggan, United States Attorney, and Aaron E. Rucker, one of the attorneys for defendant, concerning certain original exhibits introduced by the plaintiff at the trial of the above-entitled cause. It appearing to the Court that said stipulation provided for the incorporation into the record of all that is essential and material of such exhibits, and the Court being fully advised in the premises,

IT IS ORDERED that the following portions of Plaintiff's Exhibits "G," "H," and "M" shall be admitted and accepted as all that is essential of said exhibits to make up the record upon writ of error:

Plaintiff's Exhibit "G."

"ALASKA STEAMSHIP COMPANY.

Good for One First Class Passage
as Indicated.

When Properly Signed and Witnessed.

Ticket and coupon or coupons attached subject to limitation as specified thereon and to the following contract which purchaser agrees to:

Signature: MILDRED HILKERT, Purchaser.

Witness: W. H. LUDIN, Ticket Agent.

JOHN H. BUNCH,
General Freight and Passenger Agent.

ALASKA STEAMSHIP CO.

SEATTLE (City)

to

KNIK ANCHORAGE

1870 Baggage Checked

B C

S. S. ALAMEDA, VOY. 193

Room 63 Berth 1

(Endorsements)

War Tax Paid $5.80.

Issued in Exchange D N K A.

72.50.

Alaska Steamship Co.

Aug 4, 1921.

City Ticket Office. [252]

Plaintiff's Exhibit "H."

"ALASKA STEAMSHIP COMPANY.

Good for One First Class Passage

As Indicated

When Properly Signed and Witnessed

Ticket and coupon or coupons attached subject to limitation as specified thereon and to the following contract which purchaser agrees to:

Signature: MARGARET HILKERT, Purchaser.

Witness: W. H. LUDIN, Ticket Agent.

JOHN H. BUNCH,

General Freight and Passenger Agent.

ALASKA STEAMSHIP CO.

SEATTLE (City)

to

KNIK ANCHORAGE,

1871 Baggage Checked

B C

S. S. ALAMEDA, VOY. 193

Room 63 Berth 2

(Endorsements)

War Tax Paid $5.80.

Issued in Exchange D N K A.

72.50.

Alaska Steamship Co.

Aug 4, 1921.

City Ticket Office.

Plaintiff's Exhibit "M."

"UNITED STATES MILITARY LINES.

Office at Seattle, Wash.

Delivery Sheet No. Dated Aug. 3, 1921

Message Number	Time Sent Out	Address	Charges	Receipted for by	Time Delivery
64		Mildred Hilkert	Pd.	Miss Mosson	3:10 P
96	6 PM.	Mildred Hilkert	NL	Mildred Hilkert	C
44		Henrioud	NL	W. H. Ludin	8:47 A. M.

Dated at Valdez, Alaska, this 3d day of February, 1923.

By the Court:

E. E. RITCHIE,

District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 3, 1923. W. N. Cuddy, Clerk. [253]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA,

vs.

FRANK KELLY,

Defendant.

Order Settling and Certifying Bill of Exceptions.

This cause having come on for hearing on motion of defendant for an order settling and certifying his bill of exceptions to be used upon his writ of error, about to be prosecuted in said cause to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and pronounced herein on the 3d day of March, 1922, against the defendant upon a verdict of guilty of the offense of causing girls to be transported in interstate commerce for the purpose of prostitution, and it appearing that said defendant filing herein his proposed bill of exceptions served same upon counsel for the United States, giving due notice of the date and place of the settlement of said bill of exceptions, and no amendments or objections to said bill of exceptions having been made by said United States; and the undersigned Judge of said District Court having

inspected and considered the same and found such bill of exceptions to contain all of the papers, pleadings and proceedings and exceptions necessary to a determination of the questions involved and raised by defendant's exceptions.

It is therefore ORDERED that the foregoing bill of exceptions be, and the same hereby is allowed, approved and settled, and that the same shall be and constitute defendants bill of exceptions upon the prosecution of his writ of error in said cause. [254]

And it is further ordered that this order shall be deemed and is taken as a certificate of the undersigned Judge of this Court that each bill of exceptions consists of all the papers, pleadings, proceedings and exceptions filed, presented, had and done in said cause, and all of the matters upon which said judgment of March 3, 1922, is based, and of all matters and things necessary or proper for the determination of the questions involved herein or raised or attempted to be raised by said writ of error.

I further certify that this cause was tried at the November, 1921, Anchorage term of this court; that before the adjournment of said term at Anchorage, November 9, 1922, pending proceedings on writ of error herein were by order of court continued over to a term of court convening at Anchorage November 10, 1922; that said last-mentioned term is still alive, having been adjourned by order of court made December 30, 1922, to March 5, 1923; and the bill of exceptions herein is

settled and signed this day at the Valdez term of this court because court is now in session at Valdez and not at Anchorage.

Done at Valdez, Alaska, this 9th day of February, 1923.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. February 9, 1923. W. N. Cuddy, Clerk. [255]

Journal No. A–2.

District Court, Territory of Alaska, Third Division.
Page 279.

November 28, 1921, Term of Court, Anchorage, Alaska, November 9, 1922—50th Court Day.

In the District Court for the Territory of Alaska, Third Division.

CRIMINAL—No. ——.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK KELLY,
Defendant.

Order Continuing Cause.

Now, on this day, this matter coming before the Court, on motion of Ray & David, attorneys for de-

fendant, to vacate judgment, the Government being represented by the Hon. Sherman Duggan, United States Attorney, the defendant being personally present and represented by counsel,—

IT IS ORDERED that this cause be and the same is continued over until the next term of this court at Anchorage, beginning November 10th, 1922.

To which the defendant excepted and the exception was allowed by the Court. [256]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY.

Assignment of Errors.

Comes now the defendant, Frank Kelly, in the above-entitled action, and makes and files the following assignment of errors, upon which the defendant will rely in the prosecution of his writ of error herein:

First. The Court erred in permitting the witness Mildred Bowles to testify to matters foreign to the issues raised by the indictment, over and against the objection of the defendant and excepted as follows:

Q. Who invited you to go out there to the Lake?

Mr. RAY.—We object to that.

Objection overruled, defendants allowed an exception.

A. It was Mr. Anderson suggested it to those in the box at the Frisco where Mr. and Mrs Kelly, myself, Mr. Anderson, Mr. Evans and Margaret were having supper, after two o'clock,—after the pool-hall was closed, and it was very agreeable to everybody.

Q. Who had the liquor?

A. That I don't know for a positive fact, whether Mr. Anderson or Mr. Evans had it, but it was brought in. They made arrangements and it was brought there to the box.

Mr. RAY.—We move that to be stricken as not responsive to the question.

Motion denied; defendants allowed an exception. [257]

Second. The Court erred in permitting the witness Mildred Hilkert to testify to matters foreign to the issues raised by the indictment, over and against the objection of the defendant and excepted as follows:

Q. What, if anything, further was said by Mrs. Kelly at this time?

Mr. RAY.—We object to the question propounded by the District Attorney to the witness on the ground that it seeks to prejudice the jury and inflame their minds against the defendants and can in no manner tend to prove

whether or not on the third day of August, 1921, the defendant Kelly wired to the witness on the stand with the intent and purpose to induce her to live the life of a prostitute or to live a life of debauchery or to indulge in other criminal practices, as charged in the indictment.

Objection overruled; defendants allowed an exception.

Q. At this time did she say anything further to these girls or say anything further than you have already stated when she called you over acrossed the hall?

A. Not just at that moment.

Q. What, if anything, did she say?

The COURT.—About the same subject.

A. I walked across the pool-hall to the side room; three girls were in the back room, and Mrs. Kelly was standing at the door and I asked her what was the idea, that I wasn't accustomed to associating with these people, and she said, "These girls are all right, they are good fellows, good spenders, come in and meet them," and me and my sister walked in and were introduced to the girls and they bought several drinks and there were two or three men with them. [258]

Mr. RAY.—We move to strike the answer.

Motion denied; defendants except.

Third. The Court erred in permitting the witness Margaret Johnson to testify to matters foreign to the issues raised by the indictment over

and against the objection of the defendant, relative to a trip to Lake Spenard and excepted to as follows:

Mr. RAY.—It is understood that there is an objection on the part of each defendant to this line of testimony now sought to be elicited.

The COURT.—Yes, I understand that all objections are made in behalf of both defendants and it is understood that all the testimony in regard to this particular occurrence, this trip to Lake Spenard, goes in under the objection of both defendants.

Fourth. The Court erred in permitting the witness Margaret Johnson to testify to matters foreign to the issues raised by the indictment, over and against the objection of the defendant and excepted to, as follows:

Q. Did Mr. Kelly ever speak to you about a hunting party? A. Yes, he spoke to me.

Q. Can you fix the time?

A. It was the Thursday or Friday before Labor Day. There were three big days coming up—it was Thursday, Friday before that, before Saturday, Sunday and Monday.

Q. What did he say?

Mr. RAY.—We object to that as incompetent irrelevant and immaterial and not tending to prove any of the issues in the case and has been ruled out by the Court with reference to the witness Mrs. Bowles. [259]

The COURT.—It was admitted to allow the jury to consider it in connection with the intent. The objection will be overruled and exception allowed.

A. He said, "Well, it will soon be over, girls; we have three hard days ahead of us." He said, "The old lady is going on a hunting trip and when she is gone Mildred and Sid and I and you will have a regular party," and I said, "What do you mean by a regular party?" and he said, "We will have two or three quarts of good stuff to drink, we will have bonded stuff. We will sell the mule here but we will drink good stuff," and Mildred said, "Do you mean a bedroom party, Kelly?" and he said, "Sure; you are only human and it won't hurt you once."

Fifth. The Court erred in refusing to permit the witness Pierce to testify as to the character of the place conducted by the defendant, Kelly, to which exception was taken as follows:

Q. Did you ever at any time that you were employed there see anything that would indicate the fact that the practice of prostitution was being indulged? A. Nothing at all.

Mr. DUGGAN.—We object to that and move to strike the answer.

Objection sustained and motion granted. Defendants excepted.

Sixth. The Court erred in refusing and denying the motion of the defendant for a directed verdict and made at the close of all the testimony as follows:

By Mr. RAY.—My second motion is as follows: Come now the defendants, Mrs. Grace Kelly and Frank Kelly, and move the Court to instruct the jury to return a verdict of not guilty as to both defendants upon all the counts in the indictment in this case on the ground that the uncontradicted evidence submitted [260] in this case shows that the witnesses Misses Hilkert came to Alaska under a contract of employment with the defendant Frank Kelly, entered into by means of telegraphic and cable communication, and that as a consideration of the contract and one element thereof, the witnesses, the Misses Hilkert, were to repay Frank Kelly, the defendant, the cost of transportation advanced by the said Kelly to the said Misses Hilkert, upon the basis of a deduction of $5.00 per week from the contracted salary as set forth in such telegraphic communication, and that the advance of such transportation with the contract to repay as shown by the uncontradicted evidence in this case, does not come under the Interstate Commerce Regulations and is not a violation of the so-called White Slave Act.

After argument both motions were by the Court denied and defendants allowed an exception to the rulings. (Jury returns.)

Seventh. The Court erred in permitting the introduction over and against the objection and duly allowed exceptions of the defendant of testimony of various witnesses relative to events and occurrences transpiring after the 4th day of Au-

gust, 1921, the date of furnishing of the transportation plead in the indictment, as exemplified in the excerpts of testimony already herein assigned as error; this general assignment necessary, otherwise a major portion of the testimony given at the trial would have to be repeated *verbatim* herein. [261]

Eighth The Court erred in denying the motion of defendant for a new trial as based upon the misconduct of a juror, and for the other reasons urged in said motion.

Ninth. The Court erred in denying the motion of defendant in arrest of judgment.

Tenth. The Court erred in entering judgment in said cause against the defendant.

Eleventh. The Court erred in refusing to grant the motion of the defendant Frank Kelly for a directed verdict of "Not Guilty" at the close of all the testimony, upon the ground urged as to insufficiency of the proof offered and given to warrant submission of the cause to the jury.

Twelfth. The Court erred in denying the motion of defendant to vacate the judgment and sentence as void upon a verdict of an illegally constituted jury. [262]

Thirteenth. The Court erred in giving the following instruction to the jury, the same being that portion of instruction number 5 on the question of reasonable doubt reading as follows:

> "A reasonable doubt is such a doubt as may fairly and naturally arise in your minds after fully and fairly considering all the evidence in the case. It is that state of the case which

leaves the minds of the jurors, after comparison and consideration of all the evidence, in such condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant. A moral certainty is not an absolute certainty, but such a certainty as excludes every reasonable hypothesis creating a doubt."

To the giving of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Fourteenth. The Court erred in giving that portion of the instruction of the Court numbered eight, said portion reading as follows:

"You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing."

The whole instruction reads as follows:

"If you find from the evidence that the defendants, or either of them, furnished or aided in furnishing the transportation that brought the girls from Seattle to Anchorage, and caused it to be delivered to the girls for that purpose, the only remaining question for you to determine is the purpose or intent either defendant had in mind at the time of securing or aiding to secure said transportation; that is, did either defendant in so securing or aiding to secure said transportation, if you find that either [263] defendant, or both,

did secure or help to secure the same, have in mind the intent to bring said girls or either of them to Alaska with the purpose to induce, entice or persuade said girls, or either of them, to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice. If you find beyond all reasonable doubt that said defendants, or either of them, did bring or aid in bringing said girls to Alaska from Seattle for any of the unlawful purposes named, then you will find such defendant or defendants guilty upon the count or counts which you so find to be proved beyond all reasonable doubt.

But unless you do so find beyond all reasonable doubt that the defendants, or either of them, had such intent at the time said transportation was furnished, you cannot return a verdict of guilty against them, or against the one, if either, who lacked such intent at the time of furnishing said transportation.

If you find from the evidence that the defendants, or either of them, formed the intent and purpose after the girls arrived in Anchorage to persuade them to enter upon any of the unlawful and immoral practices set forth in the indictment, such finding will not authorize a conviction in this case, because the defendants are not charged in the indictment with any unlawful act done or purpose arising after the girls arrived in Anchorage.

All the testimony admitted in the case other than that designed to show that defendants

secured or aided in securing the steamship tickets which were the means of transporting the girls to Anchorage from Seattle was admitted for the sole purpose of showing the intent on the part of the defendant, or either of them, in furnishing said transportation, and it is not to be considered by you for any other purpose. You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time [264] of securing the tickets, if you find it has any such bearing.

If you find that any of the evidence admitted by the Court may tend to show that other offenses may have been committed by defendant, or either of them, in or about the Kelly pool-hall or building while the girls were there, such evidence is to be disregarded by you unless you find that it has some bearing upon the question of the intent of defendants in securing said transportation to bring the girls from Seattle to Anchorage, and then it is to be considered only so far as you may find it may affect the question of such intent."

To which portion of said instruction the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Fifteenth. The Court erred in giving instruction numbered 11 reading as follows:

"You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other side to contradict, and therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust."

To the giving of which the defendant duly excepted in the presence of the jury and before they retired, upon the ground that it is not incumbent upon the defendants, or either of them, to prove their innocence or produce any testimony, which exception was by the Court allowed.

Sixteenth. The Court erred in refusing to give to the jury defendant's requested instruction No. 16 as follows:

"You are instructed to return a verdict of not guilty on all the counts in the indictment contained as to the defendant, Frank Kelly." [265]

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Seventeenth. The Court erred in modifying defendant's requested instruction No. 13 by striking therefrom the first five lines. The requested instruction reading as follows:

"You are further instructed that the mere aiding of a person, such as the procuring of a

railroad ticket or the lending of money to travel with which to purchase a ticket, does not come under the interstate commerce regulations and is not a violation of the so-called White Slave Act and if you find in this case that the defendants as a part of their contract of employment simply advanced fare to the Hilkert girls in order to enable them to travel from Seattle, Washington, to Anchorage, Alaska, and there to enter upon their contract of employment as entertainers, then your verdict will be not guilty as to both defendants as to each and every count in the indictment; unless, however, you are satisfied beyond all reasonable doubt that at the time said transportation was provided, if it was so provided, by the defendants to the Hilkert girls, the defendant, Frank Kelly, and the defendant Mrs. Grace Kelly, furnished such transportation with the intent then and there to induce and entice the said Mildred Hilkert and Margaret Hilkert to become prostitutes and to give themselves up to debauchery and to engage in other immoral practices."

To the refusal of the Court to give said requested instruction in full the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed. [266]

Eighteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 22 as follows:

You are instructed, that contracts of employment, and other contracts, may be entered

into by and through the means of telegraphic correspondence; that is to say, an offer of employment, made by telegraphic or cable communication, may be accepted by such means or mode of communication; and, if you find, from a consideration of all the testimony submitted, that the Misses Hilkert came to Alaska in consequence of and in accordance with the telegraphic offer of the defendant Frank Kelly, and by the acceptance of such offer as embodied in said telegraphic or cable communication bound themselves to repay to the defendant Frank Kelly the cost of the transportation on the basis of a weekly deduction from the salary contracted to be paid, then, and in that event you must find the defendant Frank Kelly, "not guilty," as to all the counts in the indictment contained, for the reason that lending money with which to enable another to travel or to purchase transportation, does not come under interstate commerce regulations and is not a violation of the so-called White Slave Act.

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed. [267]

Nineteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 23, as follows:

You are instructed that if the Government adduced testimony as to isolated incidents that tended to show the atmosphere of the place

where the girls worked, the same should not be considered by the jury unless the incidents tended to establish the gist of the charges in the indictment, that is, tended to show that the defendants intended on August 3, 1921, to bring the girls to Anchorage for purposes of prostitution and debauchery; and if the incidents related by the Government witnesses did not so show, the defendants were not required to answer them.

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed. [268]

WHEREFORE, the defendant, Frank Kelly, as plaintiff in error, prays that the judgment and sentence of the District Court for the Territory of Alaska, Third Division, made and pronounced on the 3d day of March, 1922, may be reversed, set aside and vacated.

MURPHY & COFFEY,
RAY & DAVID,
AARON E. RUCKER,
Attorneys for Plaintiff in Error.

Service of the foregoing assignment of errors, by receipt of copy thereof, admitted this 23d day of January, 1923.

SHERMAN DUGGAN,
United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska. Jan. 23, 1923. W. N. Cuddy, Clerk. [269]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Petition for Writ of Error.

Comes now the above-named defendant, Frank Kelly, and says: That on the third day of March, 1922, this Court entered judgment against the defendant upon a verdict of guilty of the offense of causing girls to be transported in interstate commerce for the purpose of prostitution, directing the imprisonment of the said defendant for the period of nine months in the Federal Jail at Anchorage, Alaska, on each of the eight counts of the indictment in said cause, said sentences on all the eight counts to run concurrently:

That in said judgment, and in the proceedings had prior thereto, certain errors were committed to the prejudice of the defendant, all of which more fully appear in the assignment of errors, which is filed with this petition.

WHEREFORE the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the errors so complained of, and that the transcript of the record, testimony, proceedings,

and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be proper therein.

AARON E. RUCKER,
Attorney for Defendant.

Service of the above petition for writ of error admitted this 23d day of January, 1923, by receipt of copy thereof.

SHERMAN DUGGAN,
United States Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. W. N. Cuddy, Clerk. [270]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA

vs.

FRANK KELLY,

Defendant.

Order Allowing Writ of Error.

On this 23d day of January, A. D. 1923, came the defendant herein, by his attorneys, and filed and presented to the Court his petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by him; pray-

ing, also, that a transcript of the record, testimony, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

And, it appearing to the Court, the said defendant has heretofore filed herein a duly approved appearance or bail bond, and also a duly approved cost bond.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised,—

IT IS ORDERED that the aforesaid writ of error be, and the same is hereby allowed.

IT IS FURTHER ORDERED the duly approved appearance or bail bond heretofore filed in this cause by the defendant shall operate as a supersedeas, or stay of sentence.

And IT IS FURTHER ORDERED that a transcript of the record, testimony, files and proceedings in this cause, save as modified by the order of this Court relative to certain of the original [271] exhibits introduced in evidence in said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 23, 1923. W. N. Cuddy.

Entered Court Journal No. 13, page No. 693.
[272]

In the District Court for the Territory of Alaska,
Third Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK KELLY,

Defendant.

Undertaking on Appeal.

A judgment having been given on the —— day of March, 1922, whereby the above-named defendant Frank Kelly, after having been found guilty by a jury of the crime of violating Chapter 14, of the Criminal Code, Compiled Laws of Alaska, known as the "White Slave Traffic Act" was sentenced to serve a term of Nine Months in the Federal Jail at Anchorage, Alaska, and having appealed from said judgment or sentence to the United States Circuit Court of Appeals for the Ninth Circuit of the United States and having been duly admitted to bail in the sum of Two Thousand Dollars ($2,000.00).

We, J. E. Robarts of Anchorage, Alaska, by occupation a merchant, and John M. Collins of the same place, by occupation a merchant and miner, and L. N. Lowell of the same place, by occupation an A. E. C. employee and property holder, and

R. E. Lewis, of the same place, by occupation a contractor and property holder, hereby undertake that the above-named defendant, Frank Kelly, shall in all respects abide and perform the orders and judgments of the said Circuit Court of Appeals, upon appeal; or, if he fail to do so in any particular, that we will pay to the United States of America the sum of Two Thousand Dollars ($2,000.00).

IN WITNESS WHEREOF, we have hereunto set our names at Anchorage, Alaska, this 7th day of March, 1922.

FRANK KELLY,
Principal.
J. E. ROBARTS.
JOHN M. COLLINS.
L. N. LOWELL.
R. E. LEWIS.

Filed in the District Court, Territory of Alaska, Third Division. March 7, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [273]

United States of America,
Territory of Alaska,—ss.

J. E. Robarts, John M. Collins, L. N. Lowell and R. E. Lewis, the sureties named in the within undertaking being severally sworn, each for self and not one for the other, depose and say that they signed the foregoing undertaking; that they are residents and property holders in the City of Anchorage, Third Judicial Division, Territory of Alaska; that they, or neither of them, or attorneys

or counselors at law, U. S. Commissioner, U. S. Marshal, Deputy U. S. Marshal, Clerk of the District Court or other officer of any court, and that each are worth the sum of One Thousand Dollars, over and above all just debts and liabilities and property exempt from execution.

J. E. ROBARTS.
JOHN M. COLLINS.
L. N. LOWELL.
R. E. LEWIS.

Subscribed and sworn to before me this 7th day of March, 1922.

J. C. MURPHY,
Notary Public for Alaska.

My commission expires June 10, 1922.

Approved this 7th day of March, 1922.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 7, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [274]

In the District Court for the Territory of Alaska, Third Division.

No. ——.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK KELLY,
Defendant.

Undertaking for Costs on Appeal.

A judgment having been given on the —— day of March, 1922, whereby the above-named defendant Frank Kelly, after having been found guilty by a jury of violating Chapter 14 of the Criminal Code, Compiled Laws of Alaska, known as the "White Slave Traffic Act" and sentenced to serve a nine months' term in the Federal Jail at Anchorage, Alaska, and having appealed from such sentence and judgment to the U. S. Circuit Court of Appeals for the Ninth District, we, J. E. Robarts, of Anchorage, Alaska, by occupation a merchant, and John M. Collins, of the same place, by occupation a merchant and miner, and L. N. Lowell, of the same place, by occupation a A. E. C. employee and an Anchorage property holder, and R. E. Lewis, of the same place by occupation a contractor and Anchorage property holder, hereby undertake that the above-named defendant Frank Kelly shall pay all costs that may be awarded against him on appeal not exceeding the sum of Two Hundred and Fifty Dollars ($250.00).

IN WITNESS WHEREOF, we have hereunto set our hands at Anchorage, Alaska, this 7th day of March, 1922.

FRANK KELLY,
Principal.
J. E. ROBARTS, Surety.
JOHN M. COLLINS, Surety.
L. N. LOWELL, Surety.
R. E. LEWIS, Surety. [275]

United States of America,
Territory of Alaska,—ss.

J. E. Robarts, John M. Collins, L. N. Lowell and R. E. Lewis, being first duly sworn, upon their oaths, each for self and not one for the other, depose and say that they are the identical parties who signed the foregoing undertaking; that they are not attorneys or counselors at law, U. S. Commissioner, U. S. Marshal, Deputy U. S. Marshal, Clerk of Court or other officer of any court and that they are worth the sum specified in the foregoing undertaking as the penalty thereof over and above their just debts and liabilities and property exempt from execution.

L. N. LOWELL, Surety.
J. E. ROBARTS, Surety.
JOHN M. COLLINS, Surety.
R. E. LEWIS, Surety.

Subscribed and sworn to before me this 7th day of March, 1922.

J. C. MURPHY,
Notary Public for Alaska.

My commission expires June 10, 1922.

Approved this 7th day of March, 1922.

E. E. RITCHIE,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska. Mar. 7, 1922. W. N. Cuddy, Clerk. By J. Hamburger, Deputy. [276]

In the District Court for the Territory of Alaska,
Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

FRANK KELLY,
Defendant and Plaintiff in Error.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable E. E. RITCHIE, Judge of the District Court for the Territory of Alaska, Third Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, between the United States of America, plaintiff, and Frank Kelly, defendant, manifest error hath happened to the great damage of the said defendant, Frank Kelly, as is stated in his petition herein, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit

Court of Appeals for the Ninth Circuit, within thirty days from the date of this writ, so that you have the same in said court at San Francisco, in the State of California, in said Circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, [277] should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 23d day of January, in the year of our Lord one thousand nine hundred and twenty-three, and in the 147th year of the Independence of the United States of America.

Allowed by:

E. E. RITCHIE,

Judge of the District Court for the Territory of Alaska, Third Division.

[Seal] Attest: W. N. CUDDY,

Clerk of the District Court for the Territory of Alaska, Third Division.

Filed in the District Court, Territory of Alaska, Third Division. Jan. 23, 1923. W. N. Cuddy, Clerk. By ————, Deputy.

Entered Court Journal No. 13, page No. 694. [278]

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
FRANK KELLY,
Defendant and Plaintiff in Error.

Citation on Writ of Error (Original).

United States of America,
Territory of Alaska,—ss.

The United States of America to the Attorney General of the United States, and to Honorable SHERMAN DUGGAN, United States Attorney for the Territory of Alaska, Third Division, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writing, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Frank Kelly is plaintiff in error and the United States of America is defendant in error, and show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 3d day of February, in the year of our Lord one thousand nine hundred and twenty-three, and in the 147th year of the Independence of the United States of America.

[Seal] E. E. RITCHIE,
District Judge, Territory of Alaska.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 3, 1923. W. N. Cuddy, Clerk. By ————, Deputy. [279]

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original citation on writ of error in the case of United States of America, Plaintiff and Defendant in Error, vs. Frank Kelly, Defendant and Plaintiff in Error, No. 836—Criminal, as the same appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said court at Valdez, Alaska, this 3d day of February, 1923.

[Seal] W. N. CUDDY,
Clerk.
By S. N. Scott,
Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 3, 1923. W. N. Cuddy, Clerk. By ————, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. 836—CRIMINAL.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
FRANK KELLY,
Defendant and Plaintiff in Error.

Citation on Writ of Error (Copy).

United States of America,
Territory of Alaska,—ss.

The United States of America to the Attorney General of the United States, and to Honorable SHERMAN DUGGAN, United States District Attorney for the Territory of Alaska, Third Division, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writing, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Frank Kelly is plaintiff in error, and the United States of America is defendant in error, and show cause, if

any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 3d day of February, in the year of our Lord one thousand nine hundred and twenty-three, and in the 147th year of the Independence of The United States of America.

[Seal] E. E. RITCHIE,
District Judge, Territory of Alaska.

Service acknowledged this 3d day of February, 1923, by receipt of a certified copy of citation.

HARRY G. McCAIN,
Asst. U. S. Attorney. [280]

In the District Court for the Territory of Alaska, Third Division.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, W. N. Cuddy, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 280 pages, numbered from 1 to 280, inclusive, are a full, true and correct transcript of records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that this transcript is made

in accordance with the defendant's praecipe on file herein. I further certify that the foregoing transcript has been prepared, examined and certified to by me on behalf of the defendant, plaintiff in error, the United States of America.

That I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to $17.30, has been paid to me by Aaron E. Rucker, Esq., one of the attorneys for the defendants and appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 10th day of February, A. D. 1923.

[Seal] W. N. CUDDY,
Clerk. [281]

[Endorsed]: No. 3986. United States Circuit Court of Appeals for the Ninth Circuit. Frank Kelly, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed February 19, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3986

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KELLY,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3986

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Brief for Plaintiff in Error

L. V. RAY,
Attorney for Plaintiff in Error
SEWARD, ALASKA

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KELLY,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3986

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Brief for Plaintiff in Error

L. V. RAY,
Attorney for Plaintiff in Error
SEWARD, ALASKA

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KELLY, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 3986

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Brief for Plaintiff in Error

STATEMENT OF THE CASE

Kelly, plaintiff in error, was convicted upon an indictment charging violations of the Mann Act; in the District Court for the Territory of Alaska, Third Division. The indictment contained eight counts predicated upon the furnishing of transportation for

two young women from Seattle, Washington, to Anchorage, Alaska.

Judgment was entered upon the 3rd day of March, 1922, and pending the settlement of Bill of Exceptions, Kelly became aware for the first time that a member of the jury had formerly been convicted of a felony. A motion to vacate the judgment, as void, was denied.

Kelly operated a pool, billiard hall, bowling alley and amusement place in Anchorage, and sought to secure for his patrons an attractive musical program. He cabled on August 1, 1921, from Anchorage, Alaska, to Seattle, Washington, to two young women, recommended to him as cabaret performers, making inquiries as to the availability of such young women, one to sing, the other to play the piano.

Telegraphic correspondence resulted in the young women agreeing to come to Alaska to render the service indicated, upon a stipulated salary, with the condition that Kelly advance and pay all transportation expenses; such sums so paid were to be refunded by the deduction of a stated amount from the weekly salaries of the artists until Kelly was fully reimbursed for such expenditures.

The contract being accepted, Kelly, on August 3, 1921, wired transportation to the young women, they accepted such transportation and came from Seattle, Washington, to Anchorage, Alaska, arriving August 20th, 1921.

On September 5th, 1921, the two young women quit their employ as entertainers, owing Kelly $227.51 Record, p. 111), as evidenced by written memoranda therefor signed by the young women, which amount covered transportation costs and expenditures for wearing apparel, the latter made necessary by the fact the young women lacked adequate clothing.

The Government was permitted to detail conversations and acts of the defendant in his conduct toward the young women subsequent to the date of transportation upon the theory that testimony, as to the general atmosphere of the place, and conditions surrounding the employment was admissible to prove the intent existing at the time transportation was furnished.

ASSIGNMENT OF ERRORS

First. The Court erred in permitting the witness, Mildred Bowles, to testify to matters foreign to the issues raised by the indictment, over and

against the objection of the defendant and excepted as follows:

Q. Who invited you to go out there to the Lake?

MR. RAY. We object to that."

Objection overruled, defendants allowed an exception.

A. "It was Mr. Anderson suggested it to those in the box at the Frisco, where Mr. and Mrs Kelly, myself, Mr. Anderson, Mr. Evans and Margaret were having supper, after two o'clock,—after the pool-hall was closed, and it was very agreeable to everybody.

Q. Who had the liquor?

A. That I don't know for a positive fact, whether Mr. Anderson or Mr. Evans had it, but it was brought in. They made arrangements and it was brought there to the box.

MR. RAY. We move that to be stricken as not responsive to the question."

Motion denied; defendants allowed an exception.

Second. The Court erred in permitting the witness, Mildred Hilkert, to testify to matters foreign to the issues raised by the indictment, over and against the objection of the defendant, and excepted as follows:

Q. "What, if anything, further was said by Mrs. Kelly at this time?

MR. RAY. We object to the question propounded by the District Attorney to the witness on the ground that it seeks to perjudice the jury and inflame their minds against the defendants and can in no manner tend to prove whether or not on the third day of August, 1921, the defendant Kelly wired to the witness on the stand with the intent and purpose to induce her to live the life of a prostitute or to live a life of debauchery or to indulge in other criminal practices, as charged in the indictment."

Objection overruled; defendants allowed an exception.

Q. "At this time did she say anything further to these girls or say anything further than you have already stated when she called you over across the hall?

A. Not just at that moment.

Q. What, if anything, did she say?

THE COURT. About the same subject.

A. I walked across the pool-hall to the side room; three girls were in the back room, and Mrs. Kelly was standing at the door and I asked her what was the idea, that I wasn't accustomed to associating with these people, and she said, 'These girls are all right; they are good fellows, good spenders, come in and meet them,' and me and my sister walked in and were introduced to the girls, and they bought several drinks and there were two or three men with them.

MR. RAY. We move to strike the answer."

Motion denied; defendants except.

Third. The Court erred in permitting the wit-

ness, Margaret Johnson, to testify to matters foreign to the issues raised by the indictment over and against the objection of the defendant, relative to a trip to Lake Spenard, and excepted to as follows:

> MR. RAY. "It is understood that there is an objection on the part of each defendant to this line of testimony now sought to be elicited.
>
> The COURT. Yes, I understand that all objections are made in behalf of both defendants, and it is understood that all the testimony in regard to this particular occurrence, this trip to Lake Spenard, goes in under the objection of both defendants.

Fourth. The Court erred in permitting the witness, Margaret Johnson, to testify to matters foreign to the issues raised bv the indictment, over and against the objection of the defendant and excepted to, as follows:

> "Q. Did Mr. Kelly ever speak to you about a hunting party?
>
> A. Yes, he spoke to me.
>
> Q. Can you fix the time?
>
> A. It was the Thursday or Friday before Labor Day. There were three big days coming up —it was Thursday, Friday before that, before Saturday, Sunday and Monday.
>
> Q. What did he say?
>
> MR. RAY. We object to that as incompetent, irrelevant and immaterial and not tending to

prove any of the issues in the case, and has been ruled out by the Court with reference to the witness, Mrs. Bowles.

The COURT. It was admitted to allow the jury to consider it with the intent. The objection will be over-ruled and exception allowed.

A. He said, "Well, it will soon be over, girls; we have three hard days ahead of us." He said, "The old lady is going on a hunting trip and when she is gone Mildred and Sid and I and you will have a regular party," and I said, "What do you mean by a regular party?" and he said, "We will have two or three quarts of good stuff to drink; we will have bonded stuff. We will sell the mule here, but we will drink good stuff," and Mildred said, "Do you mean a bedroom party, Kelly?" and he said, "Sure; you are only human and it wont hurt you once."

Fifth. The Court erred in refusing to permit the witness Pierce to testify as to the character of the place conducted by the defendant, Kelly, to which exception was taken as follows:

"Q. Did you ever at any time that you were employed there see anything that would indicate the fact that the practice of prostitution was being indulged?

A. Nothing at all.

Mr. DUGGAN. We object to that and move to strike the answer."

Objection sustained and motion granted.

Defendants excepted.

Sixth. The Court erred in refusing and denying the motion of the defendant for a directed verdict and made at the close of all the testimony as follows:

> By Mr. RAY. "My second motion is as follows: Comes now the defendants, Mrs. Grace Kelly and Frank Kelly, and move the Court to instruct the jury to return a verdict of not guilty as to both defendants upon all the counts in the indictment in this case on the ground that the uncontradicted evidence submitted in this case shows that the witnesses, Misses Hilkert, came to Alaska under a contract of employment with the defendant, Frank Kelly, entered into by means of telegraphic and cable communication, and that as a consideration of the contract and one element thereof, the witnesses, the Misses Hilkert, were to repay Frank Kelly, the defendant, the cost of transportation advanced by the said Kelly to the Misses Hilkert, upon the basis of a deduction of $5.00 per week from the contracted salary as set forth in such telegraphic communication, and that the advance of such transportation with the contract to repay, as shown by the uncontradicted evidence in this case, does not come under the Interstate Commerce Regulations and is not a violation of the so-called White Slave Act."

After argument both motions were by the Court denied and defendants allowed an exception to the rulings (Jury returns).

Seventh. The Court erred in permitting the introduction over and against the objection and duly allowed exceptions of the defendant of testimony of various witnesses relative to events and occurrences

transpiring after the 4th day of August, 1921, the date of furnishing of the transportation plead in the indictment, as exemplified in the excerpts of testimony already herein assigned as error; this general assignment necessary, otherwise a major portion of the testimony given at the trial would have to be repeated verbatim herein.

Eighth. The Court erred in denying the motion of defendant for a new trial as based upon the misconduct of a juror, and for the other reasons urged in said motion.

Ninth. The Court erred in denying the motion of defendant in arrest of judgment.

Tenth. The Court erred in entering judgment in said cause against the defendant.

Eleventh. The Court erred in refusing to grant the motion of the defendant, Frank Kelly, for a directed verdict of "Not Guilty" at the close of all the testimony, upon the ground urged as to insufficiency of the proof offered and given to warrant submission of the cause to the jury.

Twelfth. The Court erred in denying the motion of defendant to vacate the judgment and sentence as void upon a verdict of an illegally constituted jury.

Thirteenth. The Court erred in giving the following instructions to the jury, the same being that portion of instruction Number 5 on the question of reasonable doubt, reading as follows:

> "A reasonable doubt is such a doubt as may fairly and naturally arise in your minds after fully and fairly considering all the evidence in the case. It is that state of the case which leaves the minds of the jurors, after comparison and consideration of all the evidence, in such condition that they cannot say they feel an abiding conviction to a moral certainty of the guilt of the defendant. A moral certainty is not an absolute certainty, but such a certainty as excludes every reasonable hypothesis creating a doubt."

To the giving of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Fourteenth. The Court erred in giving that portion of the instruction of the Court numbered eight, said portion reading as follows:

> "You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing."

The whole instruction reads as follows:

> "If you find from the evidence that the defendants, or either of them, furnished or aided in

furnishing the transportation that brought the girls from Seattle to Anchorage, and caused it to be delivered to the girls for that purpose, the only remaining question for you to determine is the purpose or intent either defendant had in mind at the time of securing or aiding to secure said transportation; that is, did either defendant in so securing or aiding to secure said transportation, if you find that either defendant, or both, did secure or help to secure the same, have in mind the intent to bring said girls or either of them to Alaska with the purpose to induce, entice or persuade said girls, or either of them, to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice. If you find beyond all reasonable doubt that said defendants, or either of them, did bring or aid in bringing said girls to Alaska from Seattle for any of the unlawful purposes named, then you will find such defendants guilty upon the count or counts which you so find to be proved beyond all reasonable doubt.

"But unless you do so find beyond all reasonable doubt that the defendants, or either of them, had such intent at the time said transportation was furnished; you cannot return a verdict of guilty against them or against the one, if either, who lacked such intent at the time of furnishing said transportation.

"If you find from the evidence that the defendants, or either of them, formed the intent and purpose after the girls arrived in Anchorage to persuade them to enter upon any of the unlawful and immoral practices set forth in the indictment such finding will not authorize a conviction in this case, because the defendants are not charged in the indictment with any unlawful act done or purpose arising after the girls arrived in Anchorage.

"All the testimony admitted in the case other than that designed to show that defendants secured or aided in securing the steamship tickets which were the means of transporting the girls to Anchorage from Seattle was admitted for the sole purpose of showing the intent on the part of the defendant, or either of them, in furnishing said transportation, and it is not to be considered by you for any other purpose. You are instructed and cautioned that you are not to allow your minds to be influenced in the slightest degree by any of this evidence except for its bearing on the question of intent, at the time of securing the tickets, if you find it has any such bearing.

"If you find that any of the evidence admitted by the Court may tend to show that other offenses may have been committed by defendant, or either of them, in or about the Kelly pool-hall or building while the girls were there, such evidence is to be disregarded by you unless you find that it has some bearing upon the question of the intent of defendants in securing said transportation to bring the girls from Seattle to Anchorage, and then it is to be considered only so far as you may find it may affect the question of such intent."

To which portion of said instruction the defendant duly excepted in the presence of the jury, and before they retired, which exception was by the Court allowed.

Fifteenth. The Court erred in giving instruction numbered 11, reading as follows:

"You are instructed that the evidence is to be estimated not only by its own intrinsic weight, but also according to the testimony which it is within the power of one side to produce and of the other

side to contradict, and therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust."

To the giving of which the defendants duly excepted in the presence of the jury and before they retired, upon the ground that it is not incumbent upon the defendants, or either of them, to prove their innocence or produce any testimony, which exception was by the Court allowed.

Sixteenth. The Court erred in refusing to give to the Jury defendant's requested instruction No. 16 as follows:

"You are instructed to return a verdict of not guilty on all the counts in the indictment contained as to the defendant, Frank Kelly."

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Seventeenth. The Court erred in modifying defendant's requested instruction No. 13 by striking therefrom the first five lines. The requested instruction reading as follows:

"You are further instructed that the mere aiding of a person, such as the procuring of a rail-

road ticket or the sending of money to travel with which to purchase a ticket, does not come under the interstate commerce regulations and is not a violation of the so-called White Slave Act, and if you find in this case that the defendants as a part of their contract of employment simply advanced fare to the Hilkert girls in order to enable them to travel from Seattle, Washington, to Anchorage, Alaska, and there to enter upon their contract of employment as entertainers, then your verdict will be not guilty as to both defendants as to each and every count in the indictment; unless, however, you are satisfied beyond all reasonable doubt that at the time said transportation was provided, if it was so provided, by the defendants to the Hilkert girls, the defendant, Frank Kelly, and the defendant Mrs. Grace Kelly, furnished such transportation with the intent then and there to induce and entice the said Mildred Hilkert and Margaret Hilkert to become prostitutes and to give themselves up to debauchery and to engage in other immoral practices."

To the refusal of the Court to give said requested instruction in full the defendant duly excepted in the presence of the jury, and before they retired, which exception was by the Court allowed.

Eighteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 22, as follows:

"You are instructed, that contracts of employment, and other contracts, may be entered into by and through the means of telegraphic correspondence; that is to say, an offer of employment made by telegraphic or cable communication may be ac-

cepted by such means or mode of communication; that if you find, from a consideration of all the testimony submitted, that the Misses Hilkert came to Alaska in consequence of and in accordance with the telegraphic offer of the defendant, Frank Kelly, and by the acceptance of such offer as embodied in said telegraphic or cable communication bound themselves to repay to the defendant, Frank Kelly, the cost of the transportation on the basis of a weekly deduction from the salary contracted to be paid, then, and in that event, you must find the defendant, Frank Kelly, "Not Guilty," as to all the counts in the indictment contained, for the reason that lending money with which to enable another to travel or to purchase transportation, does not come under interstate commerce regulations and is not a violation of the so-called White Slave Act."

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

Nineteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 23, as follows:

"You are instructed that if the Government adduced testimony as to isolated incidents that tended to show the atmosphere of the place where the girls worked. the same should not be considered by the jury unless the incidents tended to establish the gist of the charges in the indictment, that is, tended to show that the defendants intended on August 3, 1921, to bring the girls to Anchorage for the purposes of prostitution and debauchery; and if the incident related by the Government

witnesses did not so show, the defendants were not required to answer them."

To the refusal of which the defendant duly excepted in the presence of the jury and before they retired, which exception was by the Court allowed.

The points raised in the assignment of errors may be summarized as follows:

1. INSUFFICIENCY OF EVIDENCE.
2. ERROR IN ADMISSION OF TESTIMONY.
3. ERROR IN REFUSAL OF INSTRUCTIONS.
4. MISCONDUCT OF JUROR.
5. ILLEGALLY CONSTITUTED JURY.

I.

INSUFFICIENCY OF EVIDENCE

(A) It is the claim of the plaintiff in error that there is no evidence that the journey from Seattle to Alaska was undertaken with the intent upon the part of the female witnesses to engage in sexual intercourse or to indulge in other immoral practices.

(B) The uncontradicted testimony shows that the said female witnesses did not engage in sexual intercourse and denied that they engaged in any immoral practices (Record, page 116).

Cross examination of Margaret Hilkert Johnson:

Q. "Did you became a prostitute at Anchorage, Alaska, after August 3rd?

A. I did not.

Did you give yourself up to debauchery at Anchorage or engage in immoral practices?

A. I did not."

(C) That the uncontradicted testimony shows that after the two female witnesses arrived in Alaska pursuant to telegraphic contract as entertainers at a stipulated salary, they continued in such employment for the period from August 21st to September 5th, 1921.

(D) That the testimony would seem to conclusively establish upon a fair consideration of the same that when Kelly telegraphed transportation for the two young women, his only desire or intention was to secure their services as entertainers in his place of business on the main street of Anchorage, Alaska, in a building 140 feet long by 50 feet wide, in which were six pool tables, one billiard table, two bowling alleys and a cigar, tobacco and cigarette counter (Record, page 132).

"Q. Now, describe to the jury and Court that pool-hall so far as the downstairs arrangement is concerned?

A. Downstairs there is six pool-tables and a billiard table.

Q. How long a building is it?

A. 140 feet long by 50 feet wide.

Q. You say there are six pool-tables?

A. Downstairs there are six pool-tables and one billiard table; there are two bowling alleys and there is a counter in the front and lined up with cigars and tobacco and cigarettes, and a back counter also with cigarettes.

Q. What part of the hall did the pool-tables occupy?

A. They occupy the main floor.

Q. Is it on the right side of the main floor or the left side?

A. On the right side as you go in.

Q. And the left side,—what is there?

A. That is the bowling alley.

Q. That occupies about half?

A. No, the pool-tables occupy about two-thirds."

(E) The transaction resulting in the coming to Alaska of the two young ladies going under the name of Margaret and Mildred Hilkert—strangers to Kelly, and Kelly an absolute stranger to them—is shown as follows (Record, pages 133-134):

"Q. Now, in starting in the cabaret business, Mr. Kelly, did you consult any attorney here in the city regarding your rights in the matter?

A. I certainly did.

Q. Did you act upon that advice?

A. Absolutely on his advice.

Q. Was that advice of such a character as led you to believe that you had a perfect right to enter into the cabaret business?

A. Absolutely.

Q. And you entered into this cabaret business on that advice?

A. Yes, sir.

Q. Now, along about the first or second of August, 1921, did you wire out to Seattle for two young ladies to come up here and to act as entertainers?

A. Yes, sir.

Q. What were the names of those two young ladies?

A. Margaret Hilkert—there was some little controversy about her name—Margaret Hilkert and Mildred Hilkert.

Q. How did you know these two girls?

A. A gentleman by the name of Fred Waller —I had spoken about, had figured on a cabaret entertainment for the public, as there was nothing but moving pictures here, and I told him I thought it would be a good idea, as the people had no entertainment but pictures, and he told me of a couple of friends of his in Seattle that were entertainers. I told Fred, 'It is a little too early yet to bring them up here.'

Q. Did he mention their names?

A. I think he did; I wouldn't swear positively.

Q. Were these the two young ladies you wired for?

A. Yes, sir."

Government Exhibit A, page 18:

ANCHORAGE, Alaska, August 1, 1921.

Mildred Hilkert,

Normandie Apts., Seattle, Wash.

Fred Waller just arrived in Anchorage and spoke to me about you and your sister wanting to come to Anchorage. Let me know at once your lowest salary for you and your sister per week to work for me, you play the piano and sing, and sister help you also. Will advance your transportation and you both pay five dollars per week until transportation is paid out. Answer quick. Fall and winter engagement.

RAGTIME KELLY.

Government Exhibit B, Record, page 21:

SEATTLE, WN., Aug. 2, 1921.

Ragtime Kelly,

Anchorage.

Twenty-five per week for self and twenty for sister. Can leave as soon as transportation arrives. Answer at once.

MILDRED HILQUERT.

Government Exhibit D, Record, page 23:

ANCHORAGE, Alaska, ——, 192—

Mildred Hilkert,

Normandie Apts., Seattle, Wash.

I am wiring two tickets for next Alameda.

RAGTIME KELLY.

The tickets referred to in Government Exhibit D were secured from P. B. Coe, agent of the Alaska Steamship Company at Anchorage, Alaska, and Mr. Coe, by wire, authorized the furnishing of such transportation in Seattle, as per Government Exhibit E, Record, page 24:

NITE LETTER 40 PD.
ANCHORAGE, Alaska, August 3, 1921.

C. F. Henrioud,
Alaska Steamship Co.,
Seattle, Wash.

Notify by telephone and furnish Mildred Hilkut and sister Normandy Apartments upper deck tickets if possible otherwise lower deck Seattle to Anchorage on Alameda sailing from Seattle August ninth Stop Value hundred sixty-nine dollars and fifty-six cents. Debit me.

P. B. COE.

ARGUMENT

The insufficiency of the evidence was challenged by motion for a directed verdict (Record, page 212).

By MR. RAY. "My second motion is as follows: Comes now the defendants, Mrs. Grace Kelly and Frank Kelly, and moves the Court to instruct the jury to return a verdict of 'Not Guilty' as to both defendants upon all the counts in the indictment in this case on the ground that the uncontradicted evidence submitted in this case shows that the witnesses, Misses Hilkert, came to Alaska under a contract of employment with the defendant, Frank Kelly, entered into by means of telegraphic and cable communication, and that as a

consideration of the contract and one element thereof, the witnesses, the Misses Hilkert, were to repay Frank Kelly, the defendant, the cost of transportation advanced by the said Kelly to the said Misses Hilkert, upon the basis of a deduction of $5.00 per week from the contracted salary as set forth in such telegraphic communication and that the advance of such transportation with the contract to repay as shown by the uncontradicted evidence in this case, does not come under the Interstate Commerece Regulations and is not a violation of the so-called White Slave Act."

Plaintiff in error contending for the rule laid down in *Thorn v. U. S.*, 278, Fed 932, quoting on page 934 from *Wright v. U. S.*, 227 Fed. 855, as follows:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the dutv of the trial court to instruct the jury to return a verdict for the accused * * * * "

This principle is also stated in the case of *Sullivan v. U. S.*, 283 Fed. 865, at page 868 and we cite herein the cases there cited:

Union Pacific Coal Company v. United States, 173 Fed. 737, 740, 97 C. C. A. 578; *United States Fidelity Guarantee Co. v. Des Moines National Bank*, 145 Fed. 273, 279, 74 C. C. A. 553; *Vernon v. United States*, 146 Fed. 121, 123, 76 C. C. A. 547; *Sherman v. United States*, (C. C. A.) 268 Fed. 516, 516; *Garst v. United States*, 180 Fed. 339, 343, 103 C. C. A. 469; *United States v. Richards* (D. C.) 149 Fed. 443, 454.

Under the provisions of the Alaska Code, requiring the Court to give reasons and to make a statement and explanation of sentence where a penalty less than that prescribed by statute is imposed (Record, page 265) the trial judge says:

> "In this case the jury recommended the defendant to clemency. It is also the opinion of the trial judge that it is at least doubtful whether the evidence was sufficient to justify a verdict of guilty against the defendant."

Plaintiff in error respectfully submits that an examination of the testimony, which is not long or involved, will show but one conclusion; and that is, there is grave doubt as to the sufficiency of the testimony to justify a verdict against the defendant.

The trial judge, having such doubt in his mind, as shown by the record in this case and herein quoted, should have directed a verdict of Not Guilty.

The expression of the trial judge:

> *"It is also the opinion of the trial judge that it is at least doubtful whether the evidence was sufficient to justify a verdict of guilty against the defendant."*

is tantamount to a statement that all the substantial evidence in the case was as consistent with the innocence of the defendant as with his guilt. Also, that there was substantial evidence of facts which did not

and does not exclude every other hypothesis but that of guilt.

We submit the telegraphic correspondence, in itself, raises a presumption of innocence upon the entire record—for it can hardly be assumed, we contend, as a fair argument, that Kelly would wire to Seattle, Washington, in order to secure two girls for immoral purposes, women who were absolutely strangers to him 1900 miles distant, and who he only desired as a means of drawing people to spend money in his pool, billiard, bowling alley and amusement place, merely desiring the women as a novelty, in Alaska, to attract and draw trade to his licensed place of business. Attention is respectfully called to the utter impossibility of sexual acts in the premises described as operated by Kelly. While it is, of course, true that the attendance of young ladies as clerks in cigar stores. pool and billiard halls, bowling alleys, etc., does not tend to elevate such persons or tend to the refinement of young women, yet such employment in itself is not disgraceful and does not bring into disrepute such young women unless they by their own actions and solicitations pursue such a course of conduct that an imputation may arise therefrom as to immorality.

It is apparent that the young ladies upon arrival in Anchorage, Alaska, could have cancelled their contract and secured passage money for their return to Seattle, had they at that time been dissatisfied with the prospects and surroundings of their employment.

If the "atmosphere" surrounding such employment, towards which the Court permitted the prosecution to direct its testimony, in the case, at the time of the arrival of the young women in Anchorage, or within one or two days thereafter, was not in harmony with the ideas the young woman then had of right and wrong and of morality and immorality, they could have avoided the appearance of evil by departing from the society or place of business of Frank Kelly.

We call attention to the case of *Van Pelt v. U. S.*, 240 Fed. 346, a reported case from the Fourth Circuit. There is no evidence that the defendant had any purpose of debauching the prosecuting witness in any one of the meanings of the word, and we submit that it is absurd to think that Kelly, seeking an attraction for his place of business, would telegraph to absolute strangers, furnish them with transportation in the large sum of money required, in order to secure profit from the prostitution of such women.

We submit there is no evidence from which it can reasonably be held that such anticipation played any part whatever in inducing Kelly to arrange for the women to come to Alaska. No possible reason is suggested by the record why he should have gone to the trouble and expense of securing the two women to make the trip that they did, other than a desire to attract business to his pool-room, bowling alley and amusement place.

We submit there is nothing in the evidence upon which a rational mind might arrive at the same conclusion that the jury did. It is apparently a case where the jurors have altogether missed the issue they were to try, and it appeared to such jurors that there is no question the defendant conducted a place of business not conducive to good morals for which the jury believed Kelly deserved punishment. But the moral conduct of Kelly was not a question for the jury to pass upon.

The jury recommended clemency (Record, page 234).

Such verdict is so inconsistent as to make conclusive the doubt of the jury as to the guilt of Kelly under the charges of the indictment.

It is incredible that a jury would condone, excuse, extenuate and palliate the crime of a panderer

and a procurer by a recommendation of clemency in mitigation thereof.

Men do not, as jurors, excuse defendants in the commission of crimes of such nature. Is this not conclusively true of frontier countries?

The jury had no doubt but that Kelly should receive punishment, and undoubtedly came to the conclusion the moral conduct of Kelly was not to be passed upon with approval.

Again, adapting the language of the opinion of the Court in *Van Pelt v. United States,* 240 Fed. 346, 349, "Sometimes, * * * * jurors do miss altogether "the issue they are to try. They are not altogether "unlikely to do so, if it appears that there is no "question that the defendant has done something, "whether charged in the indictment or not, for which "he richly deserves condign punishment."

We submit the jury entertained some doubt as to Kelly's guilt, hence the recommendation for clemency; otherwise, in the case at bar, no such halting and "stammering" verdict would have been returned. This, together with the doubt expressed by the trial judge as to the sufficiency of the evidence, would seem to warrant a reversal of the case.

In the Athanasaw case, 227 U. S. 326, 57 Law Ed. 529, the law seems to be established that

> "Procuring or aiding the interstate transportation of a girl for the purpose of employing her under such surroundings as tended to induce her to give herself up to a condition of debauchery which virtually and naturally would lead to a course of sexual immorality constitutes the offense denounced by the White Slave Act of June 25, 1910, as the obtaining, aiding or inducing the interstate transportation "of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel, such woman or girl to become a prostitute, or to give herself up to debauchery or to engage in any other immoral practice."

In that case, however, the girl therein named was but seventeen years of age. In the case at bar both women were married (Record, pages 34 and 103), and one of said witnesses, as shown by affidavit accompanying motion for new trial was, at the time of the trial, married to two different men (Record, page 272, 273 and 274), which information did not come to the possession of the defendant until after the trial of the case.

We submit that it is difficult to determine what particular standard shall be followed in defining immoral purposes. The theory of the prosecution being that the employment was such as to tend or cause

the two women to necessarily and naturally lead a life of debauchery of a carnal nature, and relating to sexual intercourse between man and woman. While plaintiff in error contends the employment, as shown by the facts in this case, would not necessarily tend to such debauchery or naturally lead to a course of sexual immorality. It would seem to be a fair argument that it was entirely within the power of the two women, so far as their employment was concerned, whether they remained or became moral or immoral.

From a perusal of the testimony of the Misses Hilkert, and the direct and cross-examination of the two witnesses, we think it is apparent, the young women were fully able to take care of themselves. Both appeared to be of age, in possession of their natural faculties, and beyond the average in intelligence. We submit as to the main witnesses for the Government. their employment was honorable or dishonorable as they themselves decided, and were subjected to no improper advances which their own conduct did not impliedly invite.

II.

ERROR IN ADMISSION OF TESTIMONY

In the discussion of the insufficiency of the evi-

dence, general reference has been made to the facts in the case. In the assignment of errors, attention has been called specifically to alleged error in the admission of testimony tending to show the intent of the defendant Kelly at the date of furnishing the transportation plead in the indictment. We therefore call, generally, the Court's attention to assignment of errors as printed in this brief to the 1st, 2nd, 3rd, 4th, and 7th assignment of errors, all of which assignments cover this particular.

III.

ERROR IN REFUSAL OF INSTRUCTIONS

Many instructions were requested by the defendant of the trial court. On the whole case the instructions of the Court were favorable to the defendant. The failure to instruct the jury to return a verdict of Not Guilty as to the defendant Grace Kelly, wife of Frank Kelly, jointly indicted with him, cannot now, of course, be urged by reason of the verdict of the jury in her behalf, yet submit ting to the jury the question of fact relative to the guilt of Mrs. Kelly we submit prejudiced the right of the co-defendant, Frank Kelly, who prosecutes this writ or error. Plaintiff in error requested an instruction (Assignment of Error No. 18, Record, pp. 299-300), which the Court refused.

Eighteenth. The Court erred in refusing to give to the jury defendants' requested instruction No. 22, as follows:

> You are instructed that contracts of employment and other contracts, may be entered into by and through the means of telegraphic correspondence; that is to say, an offer of employment, made by telegraphic or cable communication, may be accepted by such means or mode of communication; and if you find, from a consideration of all the testimony submitted, that the Misses Hilkert came to Alaska in consequence of and in accordance with the telegraphic offer of the defendant Frank Kelly, and by the acceptance of such offer as embodied in said telegraphic or cable communication bound themselves to repay to the defendant Frank Kelly the cost of the transportation on the basis of a weekly deduction from the salary contracted to be paid them, and in that event you must find the defendant Frank Kelly, 'Not Guilty', as to all the counts in the indictment contained, for the reason that lending money with which to enable another to travel or to purchase transportation, does not come under Interstate Commerce regulations and is not a violation of the so-called White Slave Act."

We submit that such instruction upon the evidence was a right the defendant had, and the failure to give such instruction was prejudicial error.

Plaintiff in error requested the instruction set forth in the Assignment of Error No. 19 (Record, pp. 300-301) which the Court refused:

"Nineteenth. The Court erred in refusing to give to the jury defendants' requested instructions No. 23, as follows:

> You are requested that if the Government adduced testimony as to isolated incidents that tended to show the atmosphere of the place where the girls worked, the same should not be considered by the jury unless the incidents tended to establish the gist of the charges in the indictment, that is, tended to show that the defendants intended on August 3, 1921, to bring the girls to Anchorage for purposes of prostitution and debauchery; and if the incidents related by the Government witnesses did not so show, the defendants were not required to answer them."

The admission of testimony covering a considerable period of time attempting to prove isolated incidents as tending to show the atmosphere of the place where the girls worked as proof of intent, made it impossible for the defendants to answer such incidents by the testimony of witnesses who were undoubtedly present at the time of the occurrences testified to. The defense had no knowledge that they would be compelled to defend upon a charge of misconduct in the conduct of their place of business, and the defendant Kelly, it would seem, should have been given the benefit of such instruction upon the basis that it was not necessary for Kelly to prove his innocence. Had the jury followed the instructions of the Court upon the evidence, we fail to see how any ver-

dict other than Not Guilty could have been properly returned.

IV.

MISCONDUCT OF JUROR

It appears that the juror, D. H. Williams, foreman of the trial jury, was permitted to separate, during the deliberations of such jury, from the remaining eleven members of the said jury. This is shown by the affidavit of John F. Coffey, one of the counsel for defendant at the trial of the case (Record, pp. 248-249). The two bailiffs in charge of the jury and the juror himself deny any misconduct upon the part of such juror, and such juror goes so far as to state in his affidavit (Record, page 259) that "Affiant "therefore states that, to his knowledge, no harm or "prejudice was done to the defendants or either of "them on account of said transaction." In this respect the Alaska Code, Section 1024, Compiled Laws of the Territory of Alaska, 1913, provides in part as follows (Record, pp. 238-239):

> "After hearing the charge the jury may either decide in the jury-box or retire for deliberation. If they retire they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer shall, to the utmost of his abil-

> ity, keep the jury thus together separate from other persons, without drink, except water and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on."

We think the juror's action being contrary to the mandatory and express provision of the law, creates a presumption that the defendant was prejudiced thereby; this upon the theory that we are not able to ascertain whether or not such juror communicated with any person, nor with the bailiff; and, from the standpoint of the defendant, we think we are entitled to presume that communications were had by and between such juror and the bailiff who accompanied him. In this respect we cite the case of *State v. Thorn,* 117 Pac. Rep., page 58, a Utah case decided May 29th, 1911, a homicide case, and in which case one of the trial jurors, with one of the bailiffs, went into another part of the building, while the jury was at luncheon in a hotel in charge of two officers, and talked to someone over the telephone. We quote from the opinion in said case, pages 66-67, as follows:

> (8) It is further contended that a new trial ought to have been granted on the ground of the separation of the jury and the misconduct of one

of its members. The defendant, in support of his motion, showed that after the case was finally submitted to the jury, and before they had concluded their deliberations, and while they, in charge of two officers were at lunch in a public hotel, seated at the lunch table, one of the jurors with one of the officers went into another part of the building where the juror talked to some one over the telephone. These facts were not disputed. The state offered no evidence to dispute them, nor did it attempt to show what the conversation over the telephone was, or with whom it was held, or that it was harmless, and could not have influenced or affected the deliberations of the juror or his verdict. The state, in effect, urges that injury or prejudice may not be presumed from the unexplained communication, and to sustain his claim of prejudice the defendant was required to show that some harmful information was communicated to the juror which tended to influence or affect his deliberations and verdict, or circumstances from which it could be inferred, and until such proof was made the state was not required to show the contrary. That rule might well be applied to communications between a juror and a person having no interest in the litigation, which were authorized and not forbidden. It may be presumed that a juror, who, pending the trial, or after the retirement of the jury to consider of their verdict, and not forbidden to do so, communicates with one, a stranger to, and not interested in, the litigation, communicated about something not related to the case or the parties. An unexplained communication under such circumstances would not amount to misconduct, unless the circumstances attending it were such as to induce an inference of some wrongful or improper conduct. In such case a presumption of prejudice should not be indulged from an unexplained communication even though from the attending

circumstance it may be said that the conduct with respect to it was of doubtful propriety. But here the communication had, under the circumstances disclosed, was unauthorized and forbidden. If it was necessary for the juror to communicate with some one over the telephone or otherwise, the matter should have been called to the attention of the court who could have granted or refused the permission as the exigencies of the case required. To hold such private communication, under the circumstances, apart from and in the absence of his fellow jurors, and without the court's permission, certainly was misconduct. Such conduct cannot be tolerated and the purity of the jury maintained. To permit it and to excuse it as to one juror requires a permission of it to others. To do that is to allow members of the jury to be brought in contact with outsiders, and to afford them an opportunity to hold prejudicial communications about the case, or at least to expose them to such harmful and prejudicial influences. The juror here by his misconduct exposed himself to such influences. What the juror said over the telephone, or what was said to him, is not made to appear. Had his conduct in such particular not been misconduct, perhaps the presumption might be indulged that what was said by him or communicated to him was entirely personal to him and unrelated to the case until the contrary was made to appear. But he did something which he was unauthorized and forbidden to do. He was a contemnor and a wrongdoer. From the misconduct disclosed and the exposure of the juror to harmful influences, prejudice is presumed, and the burden cast on the state to show what the communication was, and that it was harmless and could not have influenced or affected the deliberations of the juror or his verdict. *Saltzman v. Sunset Tel., etc. Co.*, 125 Cal. 501, 58 Pac. 169; *State v. Cotts*, 49 W. Va., 615, 39 S. E.

605, 55 L. R. A. 176; *Hempton v. State,* 111 Wis. 127, 86 N. W. 596; *Gandy v. State,* 24 Neb. 716, 40 N. W. 302; *Tarkington v. State,* 72 Miss. 731, 17 South, 768; *Robinson v. Doneho,* 97 Ga. 702, 25 S. E. 491.

And generally in cases where it was held that the misconduct of a juror engaging in unauthorized communications with others was not prejudicial, and did not vitiate the verdict, it was affirmatively and clearly made to appear what the conversation or communication was, and that it was entirely harmless and unrelated to the case, or, in case of a separation, that the circumstances were such that the juror was not, and could not have been exposed to prejudicial or harmful influences by reason of the separation. The court in the case of *Hempton v. State, supra,* while stating that "the courts have gone a great way in sustaining verdicts, even in capital cases, notwithstanding misconduct upon a satisfactory affirmative showing that their impartiality and the result of their labors were not affected thereby," also observed that "there seems to be a growing tendency in the management of juries in important cases which calls loudly for a check if not for a substantial reform, if judicial administration is to be kept above suspicion as regards weighing out justice with the highest attainable degree of certainty." To obtain the free and dispassionate judgment of jurors in the trial of capital cases, long experience has demonstrated the necessity of preventing the jury from mingling or conversing with the people, and of keeping them secluded from all outside influences calculated to interfere with or affect their im partiality or judgment. These safeguards were at common law deemed essential to the right itself of trial by jury. That right with its ancient safeguards has been preserved in this country by Con-

stitutions and statutes. An infraction of it calculated to impair the right cannot properly receive the sanction of the court without doing violence to such constitutional and statutory provisions. If it should be thought that they no longer serve a useful purpose, let them be abolished and taken out of the Constitution and statute and others substituted in their place. As long as they remain, it is the duty of the courts to see that they are observed and obeyed. After a final submission of a case to a jury, and before reaching a conclusion as to their verdict, to permit a juror without the court's permission to leave his fellow jurors and go to another portion of the building and there engage in a private conversation over the telephone is a practice not to be tolerated, if these constitutional and statutory provisions are to be observed and given effect. He might as well be permitted to leave them, and to go on the street, or to his office, and there engage with some one in conversation. To say that the accused cannot sustain his claim of prejudice until he also shows that the juror talked about something harmful to the accused's rights is to fritter away the constitutional and statutory provisions requiring the jury to be kept secluded from all outside influences. It is enough that the state, to sustain the verdict against the accused under such circumstances, is permitted to show that the conduct, though wrongful and in disobedience of the statute and the directions of the court, nevertheless was harmless, by showing all that was said and done, and by clearly and affirmatively showing that the accused was not, nor could have been, prejudiced thereby. The state not having done this, is not entitled to hold a verdict."

This becomes doubly important by reason of the fact that this same juror, of whose misconduct we

complain, as contended by plaintiff in error, is the specific element which makes the trial jury an illegally constituted jury in that such juror had been formerly convicted of a felony and had qualified in the case as a juror, as we contend, wrongfully. We cover this matter under the next heading.

V.

ILLEGALLY CONSTITUTED JURY

Kelly moved to vacate the judgment rendered against him as void (Record, page 265), and in support thereof filed the affidavit of Charles A. Coates (Record, pages 267-268); Mrs. Grace Kelly (Record, pages 268-273), J. C. Murphy (Record, pages 275-276), and of the Rev. A. J. Markham (Record, pages 276-277). These affidavits stand uncontradicted upon the record with the exception of the affidavit of the Rev. A. J. Markham, which is to some extent controverted by the affidavit filed on behalf of the Government of the Rev. W. S. Marple (Record, page 278).

The authority for this procedure is claimed by plaintiff in error to be covered by the decision in the case of the *United States v. Port Washington Brewing Co., et al.,* 277 Fed. 306, in which the first syllabus is as follows:

"The writ of error *coram nobis* has been abolished in federal procedure as a specific remedy, and motions in the case substituted."

It is doubtless unnecessary to cite authorities relative to the power of the trial court to vacate and set aside its judgment, and we cite in support of this claim, *Mossew v. United States,* 266 Fed. 18, reversing 261 Fed. 999; *Freeman v. U. S.,* 227 Fed., 732; U. *S. v. Howe,* 280 Fed. 815.

An examination of the affidavits filed in support of this motion shows that the juror, D. H. Williams, was identified by the affiant Coates as a man who formerly had served a term in the Oregon State Penitentiary at Salem, Oregon; the affidavit of Mrs. Grace Kelly shows that D. H. Williams qualified as a juror and in response to questions propounded to him by counsel stated that he had not been convicted of a felony, that he had no information or knowledge of any facts relative to the offense or offenses charged against the defendant Kelly, had expressed no opinion, and was without prejudice to either of the defendants. That since the trial of the cause and the entry of judgment it was ascertained that Williams was convicted of a felony, sentenced to a period of from one to five years in the Oregon State Peniten-

tiary. See copy of the prison register of said penitentiary (Record, pages 269-270).

The affidavit of J. C. Murphy shows the prior conviction of the juror Williams was not learned until after the verdict had been reached, and that the said Williams had on many prior occasions acted as a juror in the Commissioner's Court, but there was no knowledge of the fact of Williams' former conviction (Record. pages 275-276).

In the affidavit of Mrs. Kelly (Record, page 271), she states the juror Williams was present at a meeting the latter part of August, in the year 1921; names certain persons present; and that as a result of such meeting Williams was deputized and authorized to take action against the defendant, Frank Kelly, with reference to the place of business conducted by him. This affidavit is to a large extent corroborated by the affidavit of the Rev. A. J. Markham (Record, page 276), while, however, the Rev. W. S. Marple, in his affidavit (Record, page 278) states that D. H. Williams was not present at the meeting described but admitted the other gentlemen named in the affidavit of the Rev. Markham were present.

Section 2120, Compiled Laws of Alaska, 1913, provide as follows:

> Sec. 2120. That a person is not competent to act as a juror who has been convicted of a felony nor unless he be a citizen of the United States, a male inhabitant of the District, over twenty-one years of age and in possession of his natural faculties and of sound mind.

The provisions of the section quoted would seem to be mandatory and it is our contention that the including of a felon as a member of the trial jury in the case at bar makes the verdict of such jury void in that defendant was not tried by a legally constituted jury.

The case of *Queenan v. Territory,* 71 Pac. 218, 61, L. R. A. 374, would seem to hold adversely to contention of plaintiff in error in this regard, but an examination of the opinion of Mr. Justice Holmes in the affirmance of the same case on other points, 190 U. S. 458, 47 Law Ed. 1175, cited in the Supreme Court Reports as *Thomas B. Queenan v. Territory of Oklahoma,* we think aids our contention. We quote as follows:

> "3. In the course of the trial the Government announced that since the last adjournment it had been informed that one of the jurors, named, had been convicted in Nebraska of what, by the law of that state, was a felony,—grand larceny,—

at a time and place mentioned, contrary to the statement of the juror on the *voir dire*. We assume, for the purposes of decision, that this disqualified the juror from serving in any case. Okla. Stat. Secs. 3093, 5182, 5183. The court asked the counsel for the prisoner what they desired to do, and its intimation indicated that if the objection were pressed the juror would be excused. This, of course, meant that the trial would have to be begun over again. The counsel for the prisoner answered that they had nothing to say, and the trial went on. It is now argued that the defendant was deprived of a constitutional right, which he could not waive. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. The contrary plainly is the law as well for the territories as for the state. See *Kohl v. Lehlback*, 160 U.. S. 293, 299, 40 L. ed. 432, 434, 16 Sup. Ct. Rep. 304, et seq., *Raub v. Carpenter*, 187 U. S. 159, 164 ante, 119, 121, 23 Sup. Ct. Rep. 72.

It is argued that the court could not have permitted a challenge at that time, because the statutes of Oklahoma, Sec. 5177, provided that "the court, for good cause shown, may permit a juror to be challenged after he is sworn to try the cause, but not after the testimony has been partially heard." This statute cannot be construed as going merely to the order of procedure,—as depriving a party of the right to challenge pending the trial, but as preserving the right for the purpose of a motion for a new trial. Either it does not apply to the case of a disqualification discovered as this was, after a part of the evidence was in, or it purports to take away the right altogether. Whatever may be the true construction of the last clause, the court seems to have been ready to stop the trial. But if the court's view was wrong, if the statute is constitutional,—as to which we do not

mean to express a doubt,—the prisoner had no right to complain; and if it is not, it was his duty to object at the time, if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights."

The section of the Alaska Code with reference to the qualification of legal jurors was enacted by Congress, is not state legislation but is legislation by the Congress of the United States declaratory in Alaska of what constitutes an impartial jury under the provision of the sixth amendment to the Constitution. It goes without question that the provisions of the Federal Constitution with respect to the right of trial by jury apply to the Territory of Alaska. *Rasmussen v. U. S.*, 197, U. S. 516, 25 Sup. Ct. Rep. 514, 49 L. ed. 862.

Such constitutional right could not be waived by the defendant or his counsel in a felony case. We submit the statute is mandatory and declaratory of the sixth amendment to the Constitution and is not a statement of a statutory right of challenge.

Section 2233 of the Compiled Laws of Alaska, 1913, makes as a general cause of challenge, first, a conviction for felony," but that particular section is under Chapter XIV, entitled "Of the formation of Trial Jury," and is in respect to procedure, while

Section 2120, of the Code, which we have cited, we claim is not a matter of statutory challenge but the right of the defendant to have a trial by a jury of persons possessing the qualifications stated in said section, viz: a citizen of the United States; a male inhabitant of the district; over 21 years of age; in possession of his natural faculties and of sound mind. And it is reiterated in Section 2228 that trial jurors shall possess the qualifications as stated in Section No. 2120, viz:

> Sec. 2228. That jurors for the trial of persons accused of any of the crimes defined in the laws of the United States, applicable to the District of Alaska, as hereby revised and codified, and for the trial of issues of fact in civil actions, shall be selected and summoned in the manner prescribed by the laws of the United States with respect to jurors of the United States district and circuit courts, and shall have the same qualifications and be entitled to the same exemptions as are provided in Chapter four, Title XV of this act in the case of grand juries.

It could hardly be successfully contended that an insane person, being one of a jury of twelve men, would make a legally constituted jury. For illustration: If a person of unsound mind acted as foreman of the jury in the case at bar, actively participated in the deliberations of such jury; and, after the judgment and sentence was pronounced, such juror was

found to be insane and to have been insane at the time of the trial—would a trial by such a jury having either one or two men of unsound mind be a protection to a defendant under the sixth amendment to the Constitution; and can it be said that the provisions of the amendment are complied with where either one or two members of the trial jury were formerly convicted of felonies?

The Government contends by reason of a decision of the Supreme Court of Oregon, the fact a felon served upon a trial jury is not a deprivation of the constitutional rights of the defendant; but this Honorable Court's attention is expressly called to the fact that the prosecution in this case is under a Federal statute and the question to be here determined cannot be determined by reference to the constitutional provisions of the various states, for the same have no application to trials in the Federal courts for offenses committed against the United States. For a general discussion of the right to trial by jury we cite the case of *Freeman v. U. S.*, 227 Fed. 732, pages 741, at the bottom of the page commencing: "The "most important question presented—in fact, the "only remaining question we find it necessary to "pass upon—is whether the defendant has been con- "victed of the crime for which he was tried in the

"manner the law of the land sanctions * * * * * * *"

It is held in the case of the *State of North Carolina v. Rogers,* 78 S. E. 293, 46 L. R. A. N. S. 38, a defendant who has plead Not Guilty to an accusation of murder, is entitled to be tried by a jury of twelve men which he could not waive even by consenting to proceeding with eleven men in the jury box when one is found mentally unfit.

After the jury was impanelled, before any evidence had been offered, it was stated to the court that one of the jurors selected was subject to fits; that he had been recently in Johns Hopkins hospital; had a part of his brain removed, and was liable to lose his mental balance if subjected to much mental strain. The state offered to call in another juror, or to make a mistrial, or to get an entirely new panel. Counsel for the defendant insisted on proceeding with eleven men. Thereupon upon agreement of counsel in open court made the trial proceeded.

The Supreme Court of the State of North Carolina held that the defendant in such case had not been tried by a jury such as contemplated by the law of the land and ordered a new trial in the case.

In the Queenan case (juror convicted of a felony) defendant had knowledge during the progress of the trial in the disqualification of one of the jurors and

counsel for defendant was given an opportunity by the trial court to take such steps as might be proper to meet the situation.

In the Rogers case (insane juror), counsel for defendant opposed the entry of an order of mistrial, the impanelling of a new jury and proceeded to trial with eleven jurors, eliminating from the jury the particular juror whose mental condition appeared unsound.

In the case at bar no knowledge of the disqualification of the juror Williams was obtained until after trial.. No opportunity afforded at the time of trial to call attention to the disqualification of such juror.

CONCLUSION

For the reasons stated herein we respectfully urge this Honorable Court to enter its order reversing the judgment and sentence heretofore imposed in this case.

Respectfully submitted,

L. V. RAY,

Attorney for Plaintiff in Error.

No. 3987

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. M. HOOVER, Trustee in Bankruptcy of the Estate of the JORDAN VALLEY LAND AND WATER COMPANY, a Bankrupt; and T. H. WEGENER, Trustee in Bankruptcy of the Estate of the JORDAN VALLEY FARMS, a Bankrupt,

Appellants,

vs.

THE MORTGAGE COMPANY FOR AMERICA,

Apellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record.

RICHARDS & HAGA and CHARLES E. WINSTEAD, Boise, Idaho, for E. M. Hoover, Trustee in Bankruptcy of the Jordan Valley Land and Water Company, Bankrupt, Appellant.

LESLIE J. AKERS, Boise, Idaho, and BARGE E. LEONARD, Yeon Building, Portland, Oregon, for T. H. Wegener, Trustee in Bankruptcy, of the Jordan Valley Farms, Bankrupt, Appellant.

McCAMANT & THOMPSON, Northwestern Bank Building, Portland, Oregon, and BRONAUGH & BRONAUGH, Northwestern Bank Building, Portland, Oregon, for the Appellee.

In the District Court of the United States for the District of Oregon.

MORTGAGE COMPANY FOR AMERICA,
Plaintiff,

vs.

JORDAN VALLEY FARMS and JORDAN VALLEY LAND AND WATER COMPANY,
Defendants.

Citation.

The United States of America,—ss.

To Mortgage Company for America:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City

of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein you, the Mortgage Company for America is plaintiff and Jordan Valley Farms and Jordan Valley Land and Water Company are defendants, to show cause, if any there be, why the judgments, decisions and decrees in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf. [1*]

WITNESS the Honorable WM. B. GILBERT, United States Circuit Judge for the District of Oregon this 8th day of January, A. D. 1923, and of the Independence of the United States, the one hundred and forty-seventh year.

WM. B. GILBERT,
Circuit Judge.

Attest: G. H. MARSH.
Clerk.
By F. G. Buck,
Chief Deputy.

Service of the foregoing Citation and receipt of a copy thereof admitted this 8th day of January, 1923.

BRONAUGH & BRONAUGH,
Of Solicitors for Plaintiff. [2]

[Endorsed]: E—8576. Mortgage Co. for America, vs. Jordan Valley Farms. Citation. U. S. Dis-

*Page-number appearing at foot of page of original certified Transcript of Record.

trict Court District of Oregon. Filed Jan. 8, 1923. G. H. Marsh, Clerk. [3]

In the District Court of the United States for the District of Oregon.

July Term, 1921.

BE IT REMEMBERED, That on the 23d day of September, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a bill of complaint in words and figures as follows, to wit: [4]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. ——.

MORTGAGE COMPANY FOR AMERICA,
Plaintiff,

vs.

JORDAN VALLEY FARMS, a Corporation, and JORDAN VALLEY LAND AND WATER COMPANY, a Corporation,
Defendants.

Complaint.

To the Honorable Judges of the District Court of the United States for the District of Oregon.

Mortgage Company for America, as plaintiff, brings this its bill of complaint against the Jordan Valley Farms, a corporation, and Jordan Valley Land and Water Company, a corporation, as defendants, and thereupon the plaintiff complains and alleges:

I.

That the plaintiff Mortgage Company for America is a corporation duly incorporated, organized and existing under the laws of the Kingdom of the Netherlands and has its principal place of business at the Hague in said Kingdom of the Netherlands and is a citizen and resident of the Kingdom of the Netherlands and is not a citizen of the United States of America, but is an alien. That the plaintiff has complied with all of the laws of the State of Oregon regulating foreign corporations doing business in said state, and is now and at all times herein mentioned was duly qualified to do business in said State of Oregon.

II.

That the defendant Jordan Valley Farms is a corporation organized and existing under the laws of the State of Idaho and has its principal place of business at the City of Boise in said state, but has qualified to do business under the laws of the State of Oregon as a foreign corporation, and is engaged in business in the County of Malheur, State of Oregon. [5]

III.

That the defendant Jordan Valley Land and Water Company is a corporation organized and existing under the laws of the State of Nevada, and has its principal place of business at ——— in said State of Nevada, and is a citizen of the State of Nevada, but has qualified to do business under the laws of the State of Oregon as a foreign corpora-

tion, and is engaged in doing business in Malheur County, State of Oregon.

IV.

That this suit involves a civil controversy for the foreclosure of a lien held by the plaintiff upon properties belonging to the defendant corporations and situated within the State of Oregon, and all of which properties are now within the State of Oregon and within the jurisdiction of the above-entitled Court and the said civil controversy is between an alien plaintiff and citizens of the United States of America as defendants, and the amount in controversy exceeds, exclusive of interest and costs, the sum and value of three thousand dollars ($3000.00).

V.

That on or about the 1st day of March, 1919, the plaintiff and the defendants entered into an agreement whereby the plaintiff agreed to loan to the defendants the sum of twenty-seven thousand dollars ($27,000.00) in Gold Coin of the United States of America, and pursuant to the terms of said agreement, the plaintiff did loan said sum of money unto the defendants and for the purpose of evidencing the said loan and the agreement of the defendants to repay the same, the said defendant corporations did make, execute and deliver unto the plaintiff their certain promissory note bearing date of March 1, 1919, whereby they jointly and severally promised to pay to the order of the plaintiff, Mortgage Company for America, on the 1st day of March, 1929, the said sum of twenty-seven thousand dollars ($27,000.00) in United States gold coin of the then

present standard of weight and fineness, with interest thereon from said date thereof, at the rate of eight per cent (8%) per annum, and that in and by the said promissory note the said defendants further agreed and promised that in case suit or action should be instituted to collect said note they would pay in addition to the costs and disbursements provided [6] by statute such sum in like gold coin as the Court might adjudge reasonable as attorney's fees to be allowed in such suit or action, and at the same time and place and as part of the same transaction said defendants executed and delivered unto the plaintiff a series of coupon interest notes for the annual installments of interest accruing upon said principal note, each of said coupon interest notes being for the sum of two thousand one hundred sixty dollars ($2,160.00) and payable serially on the 1st day of March, beginning with the 1st day of March, 1920, and ending with the 1st day of March, 1929, and each of said notes bearing interest after maturity at the rate of eight per cent (8%) per annum.

VI.

That as security for the payment of said promissory note the said defendants agreed to assign and set over unto the plaintiff, certain promissory notes secured by mortgages given by settlers upon the lands included in the Jordan Valley Irrigation Project in Malheur County, State of Oregon, together with certificates for shares of stock of Jordan Valley Water Company, appurtenant to the lands described in the respective mortgages, and as evi-

dence of the agreement between the defendants and the plaintiff a certain memorandum of agreement was made and entered into between the plaintiff and the defendants bearing date of March 1, 1919, which memorandum of agreement was executed by the defendant corporations simultaneously with the execution of the aforesaid promissory note, which said memorandum of agreement particularly described the notes and mortgages so agreed to be transferred by the defendants to the plaintiff as well as the respective certificates of water stock, and particularly set forth the conditions under which said securities were so to be transferred to the plaintiff, and pursuant to the terms of said memorandum of agreement, the said defendants did, contemporaneously with the execution thereof, endorse, transfer and deliver unto the plaintiff the several promissory notes, mortgages and certificates of stock described in said memorandum of agreement, and in the said memorandum of agreement it was expressly provided that the defendants were to assign and set over unto the plaintiff as further security, certain notes and mortgages to be particularly described in a supplemental agreement to [7] be executed thereafter.

VII.

That in and by the said memorandum of agreement, the said defendants did covenant that they would pay their said promissory note and all installments of interest thereon promptly as the same should become due according to the tenor of said principal note and coupon notes; and that until

the indebtedness evidenced thereby should be fully paid they would pay all taxes, assessments and other charges of every nature that might be levied or assessed upon or against the said collateral securities when due and payable according to law and before the same should become delinquent, and further covenanted that they would forever warrant and defend the title to said collateral securities against the claims and demands of all persons whomsoever.

VIII.

That in and by the said memorandum of agreement, the said defendants agreed that if they should fail to pay any installment of interest becoming due and payable upon their said promissory notes, then the plaintiff might at his option at any time thereafter and while such default should continue, declare the whole of the indebtedness due to it from the parties of the first part, both principal and interest, immediately due and payable, and said defendants did further covenant and agree with the plaintiff that if the defendants should fail to pay their said promissory note or any installment of interest thereon, according to the terms thereof, and of said agreement, or should fail to observe or perform each and every covenant in said agreement contained, then the plaintiff might proceed by process of law to foreclose the lien of said collateral, and that in any suit for foreclosure as provided in said agreement, that plaintiff should be entitled to recover such sum as the

Court might adjudge reasonable for attorney's fees for maintaining such suit.

IX.

That in and by the said agreement, it was expressly provided that if any mortgagor in any of said collateral mortgages should desire to pay off his mortgage and obtain satisfaction thereof, the plaintiff would, at the request [8] of Jordan Valley Farms, accept full payment of such collateral mortgage and enter satisfaction thereof, provided said Jordan Valley Farms should assign and set over unto the plaintiff, in lieu thereof, another mortgage of equal value upon lands similarly situated under said Jordan Valley Irrigation Project.

X.

That the securities so agreed to be transferred by the defendants to the plaintiff were the property of the defendant Jordan Valley Farms, and that pursuant to the terms of said agreement, said defendant Jordan Valley Farms duly endorsed the said collateral notes and delivered same to the plaintiff and at the same time executed under the corporate seal of said defendant Jordan Valley Farms an assignment of each of the collateral mortgages or caused an assignment thereof to be executed, and delivered all of said securities together with the certificate of stock for water to the plaintiff, and thereupon the plaintiff caused each of said assignments of mortgage to be recorded in the Records of Mortgages of the County of Malheur, State of Oregon, and thereby all of said collateral

mortgages were duly assigned to the plaintiff corporation.

XI.

That on or about the 9th day of July, 1919, pursuant to the terms of said memorandum of agreement above described, the said defendants entered into a supplemental agreement with the plaintiff whereby, subject to all of the terms and conditions of said original memorandum of agreement, the said defendant corporations assigned, transferred and set over unto the plaintiff the additional notes and mortgages contemplated by the provisions of said original memorandum of agreement, and said defendant Jordan Valley Farms duly executed and delivered to the plaintiff an assignment of each of said collateral mortgages and the plaintiff caused the same to be duly recorded in the Records of Mortgages of Malheur County, State of Oregon. That in and by the said supplemental agreement, it was expressly provided that the same was to be supplemental to said agreement of March 1, 1919, and that all and singular the terms and conditions and provisions of said agreement of March [9] 1, 1919, should apply to the collateral securities described in said supplemental agreement to the same extent as though said collateral therein mentioned had actually been assigned and transferred prior to the execution of said agreement of March 1, 1919, and had been specifically described therein.

XII.

That the collateral securities so transferred and set over unto the plaintiff by the defendant cor-

porations are particularly described as follows, to wit:

(Here follows a detailed description of notes secured by mortgages on lands in Malheur County, Oregon, and certificates of stock in Jordan Valley Water Company for water appurtenant to the land described in said mortgages, the aggregate principal value of such notes being approximately $59,997, all bearing interest at the rate of 6% per annum until maturity and 8% after maturity, interest payable annually, and principal payable in installments extending over a series of years.)

XIII.

That each and all of the aforesaid collateral securities, mortgages and certificates of stock of the Jordan Valley Water Company are now in the possession of the plaintiff corporation at the city of Portland, in the State of Oregon, and each and all thereof are now within the jurisdiction of the above-entitled court and are held by the plaintiff as security for the promissory note of the defendant corporations and are subject to the jurisdiction of the above-entitled court for the purpose of foreclosure of the lien of the plaintiff thereupon, as expressly provided in the said memorandum of agreement. [10]

XV.

That on or about the 1st day of March, 1920, interest coupon note number 1, executed by the defendants to the plaintiff for the sum of Two Thousand One Hundred Sixty Dollars ($2160.00)

was paid and on the 1st day of March, 1921, interest coupon note number 2 for like amount of Two Thousand One Hundred Sixty Dollars ($2160.00) became due and owing to the plaintiff from the defendants but the same has not been paid, nor any part thereof, and by reason of the default of the defendants in the payment thereof, the plaintiff has elected to declare and does declare the entire indebtedness evidenced by said promissory note for Twenty-seven Thousand Dollars ($27,000.00), and the interest coupon notes accompanying the same, to be immediately due and payable, and there is now due and owing to the plaintiff thereupon, the sum of Two Thousand One Hundred Sixty Dollars ($2160.00), with interest from March 1, 1921, at the rate of eight per cent (8%) per annum and the further sum of Twenty-seven Thousand Dollars ($27,000.00) with interest from March 1, 1921, at the rate of eight per cent (8%) per annum, and by reason of default in the payment of said indebtedness, the lien of plaintiff upon all of the collateral security hereinabove described has become subject to foreclosure and plaintiff brings this, its bill of complaint, for the foreclosure thereof.

XVI.

That the defendant Jordan Valley Land and Water Company is the owner of the irrigation system known as the Jordan Valley Irrigation Project, and that the lands covered by the collateral mortgages so assigned to the plaintiff as security for said indebtedness, are all under said irrigation project and dependent upon water therefrom for

the successful cultivation of said lands and the production of crops thereupon, and if deprived of water said lands will be of little value and great loss and suffering will be caused to the settlers owning and cultivating said lands, [11] and the value of plaintiff's collateral security for said indebtedness will be greatly depreciated; that the defendant corporations are and each of them, as plaintiff verily believes, is insolvent and the defendant Jordan Valley Land and Water Company is unable to finance the operation of said Irrigation Project or to keep the same in proper operation. That the successful cultivation of said lands during the year 1922 will be in a large measure dependant upon the proper storage of water in the reservoir constructed for conserving water for said Irrigation Project, and it is of the highest importance that the said irrigation system be properly operated and cared for during the fall of 1921 and the winter next ensuing, in order that, during such period of time, water may be stored in the reservoir, but that said system cannot be properly operated because of the financial inability of said defendant corporation to finance the same, and that it is necessary for the conservation of the plaintiff's security and for the agricultural operations of the settlers upon said lands that a receiver be appointed by the Court with power and authority under the order of the Court to operate the said irrigation system and keep the same in proper repair and in active operation. That under the certificates of stock for water hereinbefore referred

to, each of said motgagors is entitled to water for the irrigation of the lands respectively above described and the defendant Jordan Valley Land and Water Company recognizes such right. That the entire irrigation system aforesaid and all the lands above described are situate in the County of Malheur and the State and District of Oregon.

XVII.

That the sum of Twenty-seven Hundred Dollars ($2700.00) is a reasonable sum to be allowed the plaintiff as attorneys' fees for the maintenance of this suit, for the foreclosure of the lien upon the above described collateral securities.

For a second cause of suit against the defendants above named, plaintiff complains and alleges as follows: [12]

I.

Plaintiff refers to and adopts Paragraphs I, II, III, IV and XVI of the foregoing first cause of suit as a part of the allegations of this its second cause of suit, and for brevity refers to the same as though repeated and set out in full herein.

II.

That the plaintiff and the defendants entered into an agreement whereby the plaintiff agreed to loan to the defendants the sum of Fifty-five Thousand Dollars ($55,000.00) in Gold Coin of the United States of America, and pursuant to the terms of said agreement, the plaintiff did loan said sum of money unto the defendants, and for the purpose of evidencing the said loan and the agreement of the defendants to repay the same, the said

defendant corporations did make, execute and deliver unto the plaintiff their promissory note bearing date of June 1, 1919, whereby they jointly and severally promised to pay to the order of the plaintiff Mortgage Company for America, on the 1st day of October, 1929, the sum of Fifty-five Thousand Dollars ($55,000.00) in United States Gold Coin of the then present standard of weight and fineness, with interest thereon from said date thereof, at the rate of 8% per annum, and that in and by the said promissory note, the said defendants further agreed and promised that in case suit or action should be instituted to collect said note they would pay in addition to the costs and disbursements provided by statute, such sum in like Gold Coin as the Court might adjudge reasonable as attorneys' fees to be allowed in such suit or action, and at the same time and place and as a part of the same transaction, said defendants executed and delivered unto the plaintiff a series of coupon interest notes for the annual installments of interest accruing upon said principal note, the first of said coupon interest notes being for the sum of One Thousand Six Hundred Four and 15/100 Dollars ($1604.15) payable January 1, 1920, and nine of said coupon interest notes being for the sum of Forty-four Hundred Dollars ($4400.00) each, and payable serially on the 1st day of January, beginning with the 1st day of January, 1921, and ending with the [13] 1st day of January, 1929, and the eleventh of said coupon interest notes being for the sum of Thirty-three Hundred Dollars ($3300.00)

payable October 1, 1929, and each of said coupon notes bearing interest after maturity at the rate of eight per cent (8%) per annum.

III.

That as security for the payment of said promissory note the said defendants agreed to assign and set over unto the plaintiff, certain promissory notes accrued by mortgages given by settlers upon the lands included in the Jordan Valley Irrigation Project in Malheur County, State of Oregon, together with certificates for shares of stock of Jordan Valley Water Company, appurtenant to the lands described in the respective mortgages, and as evidence of the agreement between the defendants and the plaintiff a certain memorandum of agreement was made and entered into between the plaintiff and the defendants bearing date of March 1, 1919, which memorandum of agreement was executed by the defendant corporations simultaneously with the execution of the aforesaid promissory note, which said memorandum of agreement particularly described the notes and mortgages so agreed to be transferred by the defendants to the plaintiff as well as the respective certificates of water stock, and particularly set forth the conditions under which said securities were so to be transferred to the plaintiff, and pursuant to the terms of said memorandum of agreement, the said defendants did, contemporaneously with the execution thereof, endorse, transfer and deliver unto the plaintiff the several promissory notes, mortgages and certificates of stock described in said memorandum of

agreement, and in the said memorandum of agreement it was expressly provided that the defendants were to assign and set over unto the plaintiff as further security, certain notes and mortgages to be particularly described in a supplemental agreement to be executed thereafter.

IV.

That in and by the said memorandum of agreement, the said defendants did covenant that they would pay their said promissory note and [14] all installments of interest thereon promptly as the same should become due according to the tenor of said principal note and coupon notes; and that until the indebtedness evidenced thereby should be fully paid they would pay all taxes, assessments and other charges of every nature that might be levied or assessed upon or against the said collateral securities when due and payable according to law and before the same should become delinquent, and further covenanted that they would forever warrant and defend the title to said collateral securities against the claims and demands of all persons whomsoever.

V.

That in and by the said memorandum of agreement, the said defendants agreed that if they should fail to pay any installments of interest becoming due and payable upon their said promissory notes, then the plaintiff might at his option at any time thereafter and while such default should continue, declare the whole of the indebtedness due to it from the parties of the first part, both prin-

cipal and interest immediately due and payable, and said defendants did further covenant and agree with the plaintiff that if the defendants should fail to pay their said promissory note or any installment of interest thereon, according to the terms thereof, and of said agreement, or should fail to observe or perform each and every covenant in said agreement contained, then the plaintiff might proceed by process of law to foreclose the lien of said collateral, and that in any suit for foreclosure as provided in said agreement, that plaintiff should be entitled to recover such sum as the Court might adjudge reasonable for attorney's fees for maintaining such suit.

VI.

That the securities so agreed to be transferred by the defendants to the plaintiff were the property of the defendant Jordan Valley Farms, and that pursuant to the terms of said agreement, said defendant Jordan Valley Farms duly endorsed the said collateral notes and delivered same to the plaintiff and at the same time executed under the corporate seal of said defendant Jordan Valley Farms an assignment of each of the [15] collateral mortgages or caused an assignment thereof to be executed, and delivered all of said securities together with the certificate of stock for water to the plaintiff, and thereupon the plaintiff caused each of said assignments of mortgage to be recorded in the Records of Mortgages of the County of Malheur, State of Oregon, and thereby all of said

collateral mortgages were duly assigned to the plaintiff corporation.

VII.

That on or about the 20th day of December, 1919, pursuant to the terms of said memorandum of agreement above described, the said defendants entered into a supplemental agreement with the plaintiff and again on the 1st day of March, 1920, entered into a second supplemental agreement and again on the 16th day of March, 1920, entered into a third supplemental agreement with the plaintiff, by each of which supplemental agreements the said defendant corporations herein transferred and set over unto the plaintiff additional notes and mortgages contemplated by the provisions of said original memorandum of agreement, all thereof being so assigned and transferred in compliance with and subject to all of the terms and conditions of said original memorandum of agreement, said defendant Jordan Valley Farms duly executed and delivered or caused to be executed and delivered to the plaintiff an assignment of each of said collateral mortgages, and the plaintiff caused the same to be duly recorded in the Records of Mortgages of Malheur County, State of Oregon. That in and by each of the said supplemental agreements it was expressly provided that the same was to be supplemental to said agreement of March 1, 1919, and that all and singular the terms and conditions and provisions of said agreement of March 1, 1919, should apply to the collateral securities described in each of said supplemental agreements to the

same extent as though said collateral therein mentioned had actually been assigned and transferred prior to the execution of said agreement of March 1, 1919, and had been specifically described therein.

VIII.

That the securities so transferred and set over unto the plaintiff by the defendant corporations are particularly described as follows, to wit: [16]

(Here follows a detailed description of notes secured by mortgages on lands in Malheur County, Oregon, and certificates of stock in Jordan Valley Water Company for water appurtenant to the land described in said mortgages, the aggregate principal value of such notes being approximately $85,233.78, all bearing interest at the rate of 6% per annum until maturity and 8% after maturity, interest payable annually, and the principal payable in installments extending over a series of years.)

IX.

That each and all of the aforesaid collateral securities, mortgages and certificates of stock of the Jordan Valley Water Company are now in the possession of the plaintiff corporation at the City of Portland, in the State of Oregon, and each and all thereof are now within the jurisdiction of the above-entitled Court and are held by the plaintiff as security for the promissory note of the defendant corporations and are subject to the jurisdiction of the above-entitled court for the purpose of foreclosure of the lien of the plaintiff thereupon, as ex-

pressly provided [17] in the said memorandum of agreement.

X.

That on or about the 1st day of January, 1920, interest coupon note numbered 1, executed by the defendants to the plaintiff, in the sum of Sixteen Hundred Four and 15/100 Dollars ($1604.15) as above alleged, was paid, and on the 1st day of January, 1921, interest coupon note numbered 2, for the sum of Forty-four Hundred Dollars ($4400.00) became due and owing to the plaintiff from the defendants, but the same has not been paid nor any part thereof, excepting that partial payments have been made on account thereof, as follows: On January 4, 1921, $1500.00; on February 9, 1921, $250.00; on March 28, 1921, $199.30; on April 15, 1921, $456.08; and on May 14, 1921, $146.64; said partial payments amounting in the aggregate to Two Thousand Five Hundred Fifty-two and 02/100 Dollars ($2552.02), and leaving due and owing upon said interest coupon note number 2 the sum of One Thousand Seven Hundred Forty-two and 82/100 Dollars ($1742.82), with interest from May 14, 1921, at the rate of eight per cent (8%) per annum, and that by reason of the default of the defendants in the payment of said interest coupon note, the plaintiff has elected to declare and does declare the entire indebtedness evidenced by said promissory note for Fifty-five Thousand Dollars ($55,000.00) and the interest coupon notes accompanying the same to be immediately due and payable, and there is now due and owing to the

plaintiff thereupon the sum of One Thousand Seven Hundred Forty-two and 82/100 Dollars ($1742.82), with interest from May 14, 1921, at the rate of eight per cent (8%) per annum, and the further sum of Fifty-five Thousand Dollars ($55,000.00) with interest from January 1, 1921, at the rate of eight per cent (8%) per annum, and by reason of default in the payment of said indebtedness, the lien of plaintiff upon all of the collateral security hereinabove described has become subject to foreclosure and plaintiff brings this, its bill of complaint, for the foreclosure thereof.

XI.

That the sum of Fifty-five Hundred Dollars ($5500.00) is a reasonable sum to be allowed the plaintiff as attorneys' fees for the maintenance [18] of this suit for the foreclosure of the lien set forth in this second cause of suit.

WHEREFORE, plaintiff prays judgment against the defendants and the decree of the Court:

1. That upon plaintiff's first cause of suit plaintiff have and recover of and from the defendants and each of them, the sum of Two Thousand One Hundred Sixty Dollars ($2160.00), with interest from March 1, 1921, at the rate of eight per cent (8%) per annum; the sum of Twenty-nine Thousand One Hundred Sixty Dollars ($29,160.00) with interest thereon from March 1, 1921, at the rate of eight per cent (8%) per annum, and the further sum of Twenty-seven Hundred Dollars ($2700.00) as attorneys' fees for the foreclosure of plaintiff's lien set forth and described in said first cause of suit, and

that plaintiff have and recover of and from said defendants and each of them, upon plaintiff's second cause of suit, the sum of Fifty-six Thousand Seven Hundred Forty-two and 82/100 Dollars ($56,742.82), with interest from January 1, 1921, at the rate of eight per cent (8%) per annum, and the further sum of Fifty-five Hundred Dollars ($5500.00) as attorney's fees for the foreclosure of plaintiff's lien set up in its second cause of suit, and that plaintiff have judgment for all of said sums in United States gold coin and that plaintiff have and recover its costs and disbursements herein sustained.

2. That the lien of plaintiff upon the collateral described in each of said causes of suit be foreclosed and that all of said collateral be sold in the manner provided by law, and that the proceeds of sale thereof be applied toward the satisfaction of plaintiff's judgment upon its respective causes of suit, and that if the collateral securing the note described in either cause of suit shall sell for more than enough to satisfy plaintiff's lien thereupon it be decreed that any surplus of the proceeds of said sale be applied toward the satisfaction of any deficiency due to the plaintiff upon its judgment upon its other cause of suit, and that if the entire collateral shall not sell for enough to [19] pay plaintiff's claims, plaintiff have execution against the defendants and each of them for any deficiency upon its judgment.

3. That a receiver be appointed by the Court to take charge of the property and assets of each of the defendants and in the disposition of this suit, and that said receiver be authorized to operate the

irrigation system of the defendant Jordan Valley Land and Water Company by the order of the Court.

4. That the plaintiff have such other and further relief as to the Court shall seem meet and equitable.

McCAMANT & THOMPSON and
BRONAUGH & BRONAUGH,
Attorneys for Plaintiff.

(Duly verified.)

Filed September 23, 1921. G. H. Marsh, Clerk. [20]

AND AFTERWARDS, to wit, on Thursday, the 29th day of September, 1921, the same being the 76th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [21]

(Title of Court and Cause.)

Order Appointing Receiver.

It appearing that on the 23d day of September, 1921, an order was passed requiring the defendants, and each of them, to appear on the 29th day of September, 1921, at the hour of 10 A. M., then and there to show cause why a receiver should not be appointed to take charge of their respective properties; it further appearing to the Court that this order was duly and regularly served on the defendant Jordan Valley Farms, on the 26th day of Sep-

tember, 1921, and on the defendant Jordan Valley Land & Water Company on the 26th day of September, 1921, and due proof of such service having been made in this court and cause, and the defendant Jordan Valley Land & Water Company having entered a general appearance herein; and it further appearing that it is necessary to preserve the properties mortgaged, and to that end to operate the irrigation system now owned by the defendant Jordan Valley Land & Water Company;

IT IS CONSIDERED, ORDERED AND ADJUDGED that J. Humfeld be and he hereby is appointed receiver of the defendants Jordan Valley Farms and Jordan Valley Land & Water Company. The said receiver is ordered and directed to maintain the irrigation system of the defendant [22] Jordan Valley Land & Water Company and to operate the same, to the end that the mortgagors referred to in the bill of complaint, and their successors in interest, may have the water to which they are entitled, and to the end that the securities listed in the bill of complaint may be preserved and protected from destruction in value.

IT IS FURTHER ORDERED that the receiver take possession of all of the assets of the defendant corporations and proceed to liquidate the same. To this end the receiver is authorized to bring such suits and actions as shall be necessary. The receiver is directed to keep an accurate account of his receipts and disbursements, and to segregate the receipts and disbursements on behalf of the defendant Jordan Valley Farms from the receipts and

disbursements on behalf of the defendant Jordan Valley Land & Water Company. This order is without prejudice to the right of the plaintiff to retain until the further order of the Court the securities listed in the bill of complaint and alleged therein to have pledged to plaintiff.

The bond of the receiver is fixed at the sum of $5,000.00, AND IT IS ORDERED that on the approval of the said bond by this Court the receiver shall be authorized to enter upon the discharge of his duties.

Dated September 29th, 1921.

R. S. BEAN,
Judge.

Filed September 29, 1921. G. H. Marsh, Clerk. [23]

AND AFTERWARDS, to wit, on the 25th day of November, 1921, there was duly filed in said court an answer of defendants Jordan Valley Farms and Jordan Valley Land and Water Company, and afterwards, to wit, on February 17, 1922, there was duly filed an Amended Answer of said defendants. [24]

AND AFTERWARDS, to wit, on the 10th day of April, 1922, there was duly filed in said court an opinion in words and figures as follows, to wit: [25]

(Title of Court and Cause.)

Opinion.

Portland, Oregon, April 10, 1922,
10:00 A. M.

BEAN, D. J. (Oral):

The case of Mortgage Company for America against certain irrigation companies is a suit to foreclose a lien on certain personal property pledged or mortgaged to the plaintiff to secure the payment of two promissory notes, amounting in the aggregate to about eighty thousand dollars. These notes and the pledge were made in 1909. Each of them became due—was to become due during the year 1929, but they each provided for the payment of interest annually, and that in case of default in the payment of such interest the plaintiff might, at its election, declare the entire debt due and proceed to its collection.

Default was made in the payment of one installment of interest, and the plaintiff, exercising the right given it by the contract, declared the entire indebtedness due and brought this suit to foreclose.

The defendant companies by their answer admit the making of the loan and the mortgage and the pledge, admit there was a default in the payment of interest, but deny by reason of that default the plaintiff has a right to declare the entire indebtedness due because of the fact that in May, 1921, after the default, the plaintiff agreed in writing with the defendants to loan to them $117,000.00 for the purpose of carrying on the work of the construction of

the irrigation project and for the payment of the interest then due for [26] the loan. The plaintiff admits that an instrument as set out in the pleadings was signed by the parties whose names appear thereto, but denies that it was a valid and binding contract on the corporation because it was never authorized by its Board of Directors.

This contract provided for the transfer to the plaintiff of the entire irrigation system of the defendants and the transfer to a trustee of a valid unincumbered title to certain land under part of the system and an assignment to him of all notes and mortgages held by and belonging to the Irrigation Company, and an assignment of all mortgages given by the purchasers of land under the system, together with its statement of the affairs of the company, and it is alleged that the defendants failed to comply with this contract and make the assignment and transfers as therein stipulated.

Now, the contract in this case was made by the executive officers of the corporation without any authority from the Board of Directors. The by-laws provided that the affairs of the corporation should be managed by a board of five directors and they shall have power to carry on any business of the company and exercise any and all of the powers conferred upon it. The by-laws also provided that the president of the corporation should be the chief executive officer and during a recess of the board should have general control and management of its affairs; but there was no express authority from the Board of Directors to the president or any execu-

tive officers to make and execute this contract, and I do not understand that under the law the executive officers of a corporation can make a valid contract to pledge and dispose of the entire assets of the concern for the purpose of securing a debt or an obligation or for [27] money borrowed. That seems to have been the holding of the Court of this State in a case from Coos County in an early day.

But, however that may be, the evidence in this case shows quite clearly that the defendant company never complied with this contract. It never transferred to the plaintiff or the trustee the property that it agreed to transfer as security for this claim. Several hundred thousand dollars of notes and mortgages that at the time the contract was made were in the possession of a banking concern at Boise, Idaho, under an escrow or trust agreement, have so remained and they are still in possession of that concern. So that I take it that under this record the defense has not made out their case because the officers had no authority to make the contract and also because, if it is a valid contract, that the company never complied with it, and therefore the plaintiff was never obligated to make the loan as provided therein; and as a consequence the plaintiff is entitled to decree foreclosing the mortgage as prayed for in its complaint.

The complaint alleges as I read it, that $8200.00 is a reasonable attorney's fee for maintaining this suit. The only evidence given on the hearing was the testimony of Mr. Allen and Judge Littlefield, and the lowest estimate that either of them placed

upon the services was ten thousand dollars, so that the plaintiff will be entitled to a decree for the amount prayed for in the complaint, or $8200.00, as an attorney fee.

Now, it appears from the record that pending this suit and a short time before the trial the two companies were adjudged bankrupts in the State of Idaho. Therefore I take it that the Receiver who is now in possession of the property [28] other than that embraced in the pledge should hold that property in its present condition until the rights of the Trustee in Bankruptcy, if there is one appointed, shall be determined.

Filed Jan. 10, 1923, as and for April 10, 1922. G. H. Marsh, Clerk. [29]

AND AFTERWARDS, to wit, on Thursday, the 20th day of April, 1922, the same being the 40th judicial day of the regular March term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [30]

(Title of Court and Cause.)

Final Decree.

This cause came on to be heard upon the bill of complaint filed by the plaintiff and the answer of the defendants and the reply of the plaintiff to said answer, and the Court having heard the testimony adduced by the respective parties, and upon due

consideration thereof, the Court now being fully advised, IT IS NOW HERE ORDERED, ADJUDGED AND DECREED that the equities of the case are with the plaintiff and that the plaintiff is entitled to a decree for the relief prayed for in its said bill of complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount now due and payable from each of the defendants to the plaintiff, upon the promissory notes pleaded in plaintiff's first cause of suit, is the sum of Thirty-one Thousand Eight Hundred Sixteen and 80/100 Dollars ($31,816.80), of which the sum of Twenty-seven Thousand Dollars ($27,000.00) is for the principal note and Two Thousand One Hundred Sixty Dollars ($2,160.00) is for the past due interest coupon note, and Two Thousand Six Hundred Fifty-six and 80/100 Dollars ($2,656.80) is for accrued interest upon the said principal note and past due interest coupon note to the date of this decree, all payable in United States Gold Coin.

That the amount due and payable from each of said defendants to the plaintiff upon the promissory notes pleaded in plaintiff's second cause of suit for principal and interest thereon is the sum of Sixty-one Thousand Nine Hundred Twelve and 70/100 Dollars ($61,912.70), of which the sum of Fifty-five Thousand Dollars ($55,000.00) is for the principal note and One Thousand Seven Hundred Forty-two and 82/100 Dollars ($1,742.82) is for principal of the past due interest coupon note, Five Thousand One Hundred Sixty-nine and 88/100 ($5,-

169.88) is for accrued and unpaid interest thereon, all payable in United States Gold Coin. [31]

That the plaintiff do now have and recover of and from said defendants, and each of them, the said several sums of money so, as aforesaid, decreed to be due and owing from them respectively to the plaintiff, together with interest upon each of said sums from this date until paid at the rate of Eight (8) per cent per annum, all in United States Gold Coin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff has a valid and subsisting lien upon all of the collateral securities described in plaintiff's first cause of suit, and hereinafter described, superior to any right, title, interest or equity of either of the defendants, to secure the payment of all of the sums of money herein decreed to be due to the plaintiff on account of its said first cause of suit, and that the plaintiff is entitled to a decree for the foreclosure of its said lien.

That the plaintiff has a valid and subsisting lien upon all of the collateral securities described in plaintiff's second cause of suit, and hereinafter described, superior to any right, title, interest or equity of either of the defendants to secure the payment of all of the sums of money herein decreed to be due and owing to the plaintiff on account of its said second cause of suit, and that the plaintiff is entitled to a decree for the foreclosure of its said lien.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in addition to the aforesaid

sums of money so found to be due, there is now due and payable from each of said defendants to the plaintiff, under the terms and conditions of the contract or memorandum of agreement set forth in plaintiff's first cause of suit, a reasonable solicitor's fee for the foreclosure of the lien created by said contract, and that the sum of Twenty-seven Hundred Dollars ($2,700.00) is a reasonable sum to be allowed plaintiff as such solicitor's fee, and that the plaintiff have and recover such sum of Twenty-seven Hundred Dollars ($2,700.00), with lawful interest thereon from this date, of and from said defendants, and each of them, in addition to all other sums herein decreed to be due and owing to the plaintiff on account of its said first cause of suit.

That in addition to the aforesaid sums of money so found to be due to the plaintiff upon its second cause of suit, there is now due and payable, from each of the said defendants, to the plaintiff, under the terms [32] and conditions of said contract or memorandum of agreement set forth in plaintiff's second cause of suit, a reasonable solicitor's fee for the foreclosure of the lien created by said contract, and that the sum of Fifty-five Hundred Dollars ($5,500.00) is a reasonable sum to be allowed the plaintiff as such solicitor's fee, and that the plaintiff have and recover such sum of Fifty-five Hundred Dollars ($5,500.00), with lawful interest thereon from this date, of and from said defendants, and each of them, in addition to all other sums herein decreed to be due and owing to the

plaintiff on account of its said second cause of suit.

That the said defendants pay to the plaintiff, within ten (10) days from this date, all of the sums of money herein decreed to be due and payable to the plaintiff, together with plaintiff's costs and disbursements herein to be taxed by the clerk of this court, and that in default of such payment being made by said defendants, all of the collateral securities in the bill of complaint described, be sold, and the proceeds of the sale thereof applied in satisfaction of this decree as hereinafter further ordered and decreed, and that the defendants, and each of them, and all persons claiming from, through or under them, or either of them, be absolutely and forever barred and foreclosed of and from all right, title, interest and equity of redemption in and to the said collateral securities, and every part thereof, and that upon the sale thereof the title of the purchaser or purchasers respectively to the said collateral securities so sold become and be absolute without any right of redemption from such sale.

That the said collateral securities be sold in the following order and manner, to wit:

(Description of mortgages omitted in accordance with the praecipe.) [33]

And that the proceeds of the sale of such collateral securities be applied, first, to the payment of the expenses, costs and disbursements of this proceeding and said solicitor's fees, and next to the payment of the amounts decreed due upon the

promissory notes described in plaintiff's first cause of suit.

Second. That there next be sold in one lot or parcel, free and clear of all liens or claims all of those certain collateral securities mentioned in plaintiff's second cause of suit and included in the memorandum of agreement, and several agreements supplemental thereto, mentioned in said second cause of suit, which said collateral securities are more particularly described as follows, to wit:

(Description of mortgages omitted in accordance with praecipe.) [34]

And that the proceeds of the sale of all such collateral securities be applied, first, to the payment of said solicitor's fee for the foreclosure of the lien of said collateral securities described in plaintiff's second cause of suit, and next to the payment of the amounts decreed to be due and owing to the plaintiff under its second cause of suit.

(3) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if any balance of proceeds of sale of any of said property remains after the application of so much thereof as may properly be applicable to the payment of the sums decreed to be due and owing to the plaintiff, the same be paid into the Registry of this Court to abide such decree as the Court may hereafter pass in reference thereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if any deficiency shall be found to be due the plaintiff after exhausting the proceeds of sale of said property properly appli-

cable to the satisfaction of this Decree, the plaintiff have personal judgment and decree therefor and execution thereupon against each of said defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sale of said properties as herein decreed be made and conducted by Robert F. Maguire, Esq., Master in Chancery of this Court, who is hereby appointed to execute this Decree.

That the said Master in Chancery give public notice of time and place of said sale by previously publishing said notice once each week for four successive weeks in some newspaper of general circulation published in the county of Multnomah, in the State of Oregon.

That the plaintiff may become the purchaser at such sale, and that if the plaintiff does become such purchaser, the said Master may accept from said plaintiff, in lieu of cash payment, said plaintiff's receipt for any portion of such bid which may properly be payable to the plaintiff under this Decree. [35]

That said Master, on such sale being made, execute a certificate of purchase to each purchaser or purchasers of said properties, or any portion thereof, which certificate shall describe the property so purchased by reference to the name of the mortgagor and the mortgagee in each instance, and the book and page of the record in the County of Malheur of each mortgage so sold and the sum paid therefor, or if purchased by the plaintiff herein, the

amount of plaintiff's bid, and that the said certificate of purchase recite and decree that the purchaser therein named has become the absolute owner of all of the collateral securities covered by the purchase mentioned in such certificate.

That the sale of all said properties be made at public auction, at the Federal Building in which this Court is held, in the City of Portland, County of Multnomah, State of Oregon, at such time as the Master may designate in said public notice of sale.

That the said Master may adjourn said sale from time to time, or from week to week, or otherwise, by giving such notice as to time of such adjournment as to him shall seem reasonable, and may make said sale at the time and place to which said sale may be adjourned.

That the Court reserves the right in term time, or at chambers, to appoint another person as such Master, with like powers, in case of the death or disability to act of the Master herein designated, or in case of resignation or failure to act or removal by the Court of said Master.

That upon the sale of the properties each purchaser, other than the plaintiff, shall forthwith deposit with the said Master the entire purchase price at which such property shall be sold to him, and that every purchaser of any part of said properties, upon the execution and delivery to him of the Master's certificate of sale, shall be entitled to the immediate possession of the collateral securities so purchased by him, and that the Master in

Chancery make delivery of the collateral securities together with the certificate of sale.

Dated April 20, 1922.

R. S. BEAN,
Judge.

Filed April 20, 1922. G. H. Marsh, Clerk. [36]

AND AFTERWARDS, to wit, on the 4th day of May, 1922, there was duly filed in said court a petition of E. M. Hoover, trustee in bankruptcy of the estate of the Jordan Valley Land & Water Company, for delivery to him of certain property, in words and figures as follows, to wit: [37]

(Title of Court and Cause.)

Petition of E. M. Hoover, Trustee in Bankruptcy, for Delivery to Him by the Receiver of the Jordan Valley Land and Water Company of Certain Property.

To the Honorable, The District Court of the United States for the District of Oregon:

Your petitioner, E. M. Hoover, respectfully shows:

1. That on the 10th day of March, 1922, the defendant Jordan Valley Land & Water Company was by the District Court of the United States for the District of Idaho, Southern Division, adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy,

and on said date an order was duly made and entered by said Court, adjudging said Jordan Valley Land & Water Company a bankrupt, as aforesaid, a full, true and correct copy of which said order is hereto attached marked Exhibit "A" and made a part hereof.

2. That thereafter your petitioner, at a meeting of the creditors of said bankrupt duly called and held, pursuant to notice, on the 17th day of April, 1922, was appointed Trustee in [38] the case pending in bankruptcy in said District Court of the United States for the District of Idaho, Southern Division, wherein said Jordan Valley Land & Water Company was adjudged a bankrupt, as aforesaid; and your petitioner thereupon accepted said trust with all the duties and obligations pertaining thereto, and thereafter, on the 18th day of April, 1922, your petitioner made and filed his bond as Trustee in said bankruptcy proceedings, which bond was duly approved by R. M. McCracken, Esq., Referee in Bankruptcy, residing at Boise, Idaho, and before which said Referee said bankruptcy proceedings were pending. That attached hereto marked Exhibit "B" and made a part hereof, is a full, true and correct copy of the bond so filed by your petitioner as such Trustee, and of the order of said R. M. McCracken, Esq., Referee in Bankruptcy, approving your petitioner's said bond.

3. That as your petitioner is informed and believes, and so alleges the fact to be, the estate of said bankrupt consists, among other things, of a

partially constructed irrigation system in Malheur County, Oregon, constructed by said bankrupt under a contract with the State of Oregon dated on or about June 21, 1918. Said irrigation system consists of a reservoir commonly known as the Antelope Reservoir, near Jordan Valley, Oregon, and of canals leading into said reservoir, and canals and laterals and other structures for distributing the water stored in said reservoir, and other waters, to, over and upon lands to be reclaimed from said irrigation system.

4. Your petitioner further alleges upon his information and belief that the said bankrupt owned at the time it was adjudged a bankrupt, as aforesaid, certain farm lands in Malheur County, Oregon, and a large number of mortgages and water contracts [39] for the sale of water rights in said irrigation system; also material, supplies, machinery, tools and equipment, used or intended to be used in the construction of said irrigation system.

5. That heretofore and on or about the month of September, 1921, as your petitioner is informed and believes, and so alleges the fact to be, one J. Humfeld was by this Honorable Court appointed Receiver in said cause at the instance of the said plaintiff, to protect the estate and property covered by plaintiff's mortgage sought to be foreclosed in said cause; but your petitioner shows that having been appointed Trustee in bankruptcy he is under the law entitled to the possession of all property, real, personal and mixed, wheresoever situated,

owned by the said bankrupt at the time it was adjudged a bankrupt, as aforesaid; and that in order to carry out the true intent and purpose of the said Bankruptcy Act, the said J. Humfeld, Special Receiver in said cause, should deliver to your petitioner the possession and control of all property of whatsoever kind in his possession or under his control as Receiver in said cause, belonging to said bankrupt.

6. Your petitioner further shows that the notes and mortgages held as collateral security by the said plaintiff under the trust deed or pledge foreclosed in the suit cannot be sold at this time at their fair and reasonable value in view of the condition of said irrigation system and the bankruptcy of the said Jordan Valley Land & Water Company, and your petitioner is not at this time, nor are the creditors which your petitioner represents, in position to bid at the sale of said securities under the decree in this cause; and in order to protect the general creditors of said bankrupt and prevent a sacrifice of said notes and mortgages and assets of said bankrupt, [40] the sale thereof should be postponed until said mortgaged assets can be sold at a price that would be fair and just to all creditors of said bankrupt; that if said securities are offered for sale without an upset price being first fixed by this Court, below which said securities shall not be sold, your petitioner verily believes, and upon his information and belief alleges the fact to be, that said securities will be sold at a great sacrifice and far below their real value and will be

bid in by plaintiff or someone in its behalf, and a deficiency judgment then demanded by the said plaintiff for a large amount, and said plaintiff will under such deficiency judgment attempt to share in the other assets of said bankrupt with the general creditors of said bankrupt.

WHEREFORE, Your petitioner prays:

1. For an order directing J. Humfeld, Receiver in this cause of the estate or part of the estate of said Jordan Valley Land & Water Company, to transfer and deliver to your petitioner the possession and control of all property, real, personal and mixed, and wheresoever situated, in his possession, either as Receiver or otherwise, belonging to the said Jordan Valley Land & Water Company on the 10th day of March, 1922.

2. For an order directing that no sale shall be had until the further order of this Court, of any of the notes, mortgages or other securities held by the said plaintiff as security for the amount adjudged to be due it in this suit; or in the event a sale thereof be permitted, that an order be made fixing an upset or fixed price below which said securities shall not be sold.

3. For such other and further relief as may be just and equitable in the premises.

(Duly verified.)

E. M. HOOVER,
RICHARDS & HAGA and
C. E. WINSTEAD,
His Solicitors,
Residence Boise, Ida. [41]

Exhibit "A."

In the District Court of the United States for the District of Idaho, Southern Division.

ADJUDICATION.

IN BANKRUPTCY—No. 1574.

In the Matter of JORDAN VALLEY LAND & WATER COMPANY, a Corporation, Bankrupt.

At Boise in said district, on the 10th day of March, 1922, before the Honorable Frank S. Dietrich, Judge of said court in bankruptcy, the petition of Bank of Jordan Valley, Oregon, and others, that Jordan Valley Land & Water Company, a corporation, be adjudged bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Jordan Valley Land & Water Company, a corporation, is hereby declared and adjudged bankrupt accordingly.

Dated this 10th day of March, 1922.

FRANK S. DIETRICH,
Judge.

U. S. District Court, District of Idaho. Filed Mar. 10, 1922. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy. [42]

Exhibit "B."

BOND OF TRUSTEE.

No. 1574.

KNOW ALL MEN BY THESE PRESENTS, That we, E. M. Hoover of Boise, Idaho, as principal, and Boise Title and Trust Company, a corporation organized and existing under the laws of the State of Idaho, as surety, are held and firmly bound unto the United States of America in the sum of Five Thousand ($5,000) Dollars, lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Signed and sealed this 18th day of April, A. D. 1922.

The condition of this obligation is such that whereas, the above-named E. M. Hoover, was on the 17th day of April, A. D. 1922, appointed trustee in the case pending in Bankruptcy in said court, wherein Jordan Valley Land and Water Company is the Bankrupt, and he, the said E. M. Hoover, has accepted said trust with all the duties and obligations pertaining thereunto,

Now, therefore, if the said E. M. Hoover, Trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfull and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall

come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise to remain in full force and virtue.

E. M. HOOVER, (Seal)

Signed, sealed and delivered in presence of

W. J. ABBS.

BOISE TITLE & TRUST COMPANY. (Seal)

By S. H. HAYES,

President. (Seal)

Attest: W. J. ABBS,

Secretary. [43]

ORDER APPROVING TRUSTEE'S BOND.

Southern Division,

District of Idaho,—ss.

It appearing to the Court that E. M. Hoover of Boise, Idaho, and in said District, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors, to wit, in the sum of Five Thousand ($5,000.00) Dollars, it is ordered that the said bond be, and the same is hereby, approved.

R. M. McCRACKEN,

Referee in Bankruptcy.

Filed May 4, 1922. G. H. Marsh, Clerk. [44]

AND AFTERWARDS, to wit, on the 27th day of June, 1922, there was duly filed in said court a petition of J. Humfield, Receiver, for an order allowing expenses and fixing compensation, in words and figures as follows, to wit: [45]

(Title of Court and Cause.)

Petition of Receiver and Order Allowing Expenses and Fixing Compensation.

To the Honorable CHARLES E. WOLVERTON and the Honorable ROBERT S. BEAN, Judges of the Above-entitled Court:

The petition of J. Humfeld respectfully avers that your petitioner was appointed receiver for the above-named defendants on the 26th of September, 1921. That at the time when the receivership order was passed Jordan Valley Land & Water Company had ceased to function and the irrigation system owned by it was liable to damage, deterioration and destruction for lack of care. Your petitioner took possession of the system and has provided the moneys necessary for its maintenance and care during all of the time which has intervened since his appointment. Your petitioner has been in receipt of no revenues and has been obliged to provide for funds necessary to maintain the irrigation system aforesaid and to take care of the miscellaneous receivership expenses. The liquid assets of the defendants are all without the state of Oregon. The [46] holders of these liquid assets, including the evidences of indebtedness due to the defendant corporations, have refused to recognize the receiver-

ship as operative outside of the State of Oregon and have therefore refused to turn over to your petitioner any of the liquid assets or any of the evidences of debt owing to the defendant corporations. That the said liquid assets and evidences of debt are all situate in the State of Idaho. That the receiver has made four trips from Portland, Oregon, to Jordan Valley for the purpose of keeping in personal touch with the irrigation system, and has also made numerous trips to the state capital for the purpose of interviewing the state engineer and avoiding, if possible, the forfeiture of the irrigation system to the State of Oregon for lack of compliance by the defendant Jordan Valley Land and Water Company with the terms and provisions of the contract with the state. That the receiver has employed competent help to remain on the ground and look after the system and has raised the funds necessary to pay the expenses of such help. That about five thousand acres of land are now under the project and had to be provided with water in order that crops could be raised during the year 1922. That about forty families were depending on irrigation in order to raise their crops. That because of the efforts of your petitioner the system has been maintained intact and the value of the farming land under the ditch has not been lost. That the land under the ditch is for the most part covered by mortgages pledged to plaintiff and for the foreclosure of which this suit is brought. That while the receivership has preserved a most valuable asset of the Jordan Valley Land & Water Company for the benefit of that

corporation and for its creditors it [47] has also been effectual to preserving the value of the lands which are pledged to plaintiff through the mortgages described in the complaint and which plaintiff has purchased at foreclosure sale held on the 23d of June. That as receiver of the Jordan Valley Land & Water Company your petitioner has incurred the following expenses:

1921.

October.

Premium on bond as receiver	$ 12.50
Postage	.80
Stationery	1.65
Trips to State Engineer at Salem, to the office of the company at Boise and to the project at Jordan Valley	79.50
Telephone	.75
Office help during October	50.00
Salary to Chas. E. Lanning, custodian of the project, from Oct. 15th to November 30th	150.00
Labor paid to Lanning, on project	35.00
Asphaltum for covering the leaks on the roof of the building at Ruby	18.75
Stationery	1.10
Office help during November	50.00

December.

Salary of the water master of the project for the month of September	220.00
Salary of the water master for October 1st to October 15th	110.00
Repairs on the auto belonging to the project	25.14

Salary to the water master from October 15th to November 1st	37.50
Salary to the water master for the month of November	75.00
Salary to the water master for the month of December	75.00
Office help during December	50.00
Salary of Chas. E. Lanning for December (custodian of the project)	100.00
Postage	2.69
Stationery	4.50
1922.	
January.	
Telephone	.70
Trip to the Puget Sound Bridge and Dredging Co. at Seattle for a conference for a sale of the project.	100.50
Postage	4.64
Stationery	98
	$1206.70

[48]

Brought forward	$1206.70
Trip to State Engineer at Salem	6.95
February.	
Telephone	1.10
Salary of water master at office for the month of January	150.00
Office help during January	50.00
Salary of Chas. E. Lanning, custodian of project, for month of January	100.00
Trip to Boise and to the project (10 days)	113.05

Telegrams	2.29
Postage	3.30
March.	
Telephone	.70
Salary of water master for February	150.00
Office help during February	50.00
Salary Chas E. Lanning during February	100.00
Postage	3.00
April.	
Office help during March	50.00
Salary Chas. E. Lanning during March	100.00
Telephone	3.50
Labor on project, paid to Lanning	42.00
Telegrams	20.49
Trip to Jordan Valley project	162.90
May.	
Office help during April	50.00
Labor paid to Lanning	58.70
Salary Chas. E. Lanning for April	100.00
Salary Chas. E. Lanning for May	100.00
Office help during May	50.00
Labor paid for break in feeder canal	460.75
June.	
Labor on feeder canal	98.00
	$3233.43

Your petitioner as receiver of Jordan Valley Farms has incurred the following expenses:

1921.	
October.	
Premium on bond as receiver	$ 12.50
Postage	.80

Stationery	1.65
Trips to State Engineer at Salem, to the office of above company at Boise and to the project at Jordan Valley	79.50
	$ 94.45

[49]

Brought forward	$ 94.45
Office help during October	50.00
November.	
Stationery	1.05
Office help during November	50.00
Salary to water master of project, hired as help at my office, from Oct. 15—Nov. 1	37.50
Salary to water master for the month of November	75.00
Salary to water master for the month of December	75.00
December.	
Office help	50.00
Postage	2.00
1922.	
January.	
Insurance on buildings at Ruby	56.40
Stationery	2.00
February.	
Office help during January	50.00
Trip to the office at Boise and to the project at Jordan Valley (10 days)	113.05
March.	
Office help during February	50.00
Stationery	3.60

Office help during March	50.00
Office help during April	50.00
Office help during May	50.00
	$860.05

Your petitioner has made earnest effort to interest purchasers in the property but has been greatly handicapped in that regard by the bankruptcy proceedings and by the contention of the State of Oregon that the Jordan Valley Land & Water Company had violated its contract and forfeited its rights thereunder. That the receivership has absorbed a large measure of the time of your petitioner and has subjected your petitioner to heavy burdens and responsibilities, all of which have been discharged to the best of his ability. That the irrigation system has been kept intact as a going concern only through the receivership, and the irrigation [50] system if appraised in the light of its cost or its replacement value would be worth at least a quarter of a million dollars.

WHEREFORE, your petitioner prays that this petition may be set for hearing by the Court, all parties interested being given an opportunity to be heard thereon, and that thereupon an order may be passed fixing a reasonable compensation to be paid your petitioner as receiver of Jordan Valley Farms, and also a reasonable sum to be paid your petitioner for his services as receiver of Jordan Valley Land & Water Company. That the expenses of your petitioner may also be approved as proper expenses and that by order of this Court

the plaintiff be required to pay the allowances so made to your petitioner for services and disbursements and that by the order aforesaid passed on notice to all parties the plaintiff may be allowed a lien upon the assets of the defendant corporations commensurate with the amount so paid by it, and that delivery of the assets of the defendant corporations be withheld to the defendants and to their successors in interest until the lien and claim of plaintiff, arising as aforesaid, be liquidated. Your petitioner prays that he may have such other and further relief as to the Court shall seem meet and equitable.

J. HUMFELD,
Receiver.

BRONAUGH and BRONAUGH,
McCAMANT and THOMPSON,
Attorneys for Receiver.

(Duly verified.)

Filed June 27, 1922. G. H. Marsh, Clerk. [51]

AND AFTERWARDS, to wit, on the 8th day of July, 1922, there was duly filed in said court a petition of T. H. Wegener, Trustee in Bankruptcy of the Estate of the Jordan Valley Farms, for the delivery to him of certain property, in words and figures as follows, to wit: [52]

(Title of Court and Cause.)

Application for Delivery of Securities and Property Belonging to Jordan Valley Farms to Trustee in Bankruptcy.

Comes now T. H. Wegener, as Trustee in Bankruptcy of the Estate of Jordan Valley Farms, a corporation, bankrupt, and respectfully represents unto the court, and petitions as follows:

I. That J. Humfeld, Receiver appointed by the above-entitled court in the above-entitled proceedings, has in his possession and under his control, certain books, contracts, notes, mortgages, deeds of trust, warranty deeds, office furniture and equipment and other personal property belonging to said bankrupt, Jordan Valley Farms, a complete inventory and list thereof being on file in the above-entitled proceedings, none of which said property is covered by the lien of the mortgage or decree of foreclosure entered in the above-entitled proceeding on or about April 20th, 1922.

II. That demand has duly been made upon said J. Humfeld, Receiver as aforesaid, and the Mortgage Company for America, plaintiff in the above-entitled suit, for the return of said property and securities to the Trustee in Bankruptcy as aforesaid, but they have wholly failed and refused to deliver said property to said Trustee.

III. That your petitioner is the duly appointed, elected, qualified and acting Trustee in bankruptcy of the said Estate of Jordan Valley Farms, bank-

rupt, and is entitled to the delivery and possession of said property, and all rights therein and thereunder; and that said J. Humfeld, Receiver, and the Mortgage Company for America, plaintiff, are not entitled to the possession, control, or any rights in and to said property, or any part thereof. [53]

IV. That your petitioner makes appearance in the above-entitled proceedings, specially, and only for the purpose hereinabove specified, and not otherwise.

WHEREFORE, your petitioner respectfully prays and requests an order of this court, directing the said J. Humfeld, Receiver, and the Mortgage Company for America, plaintiff herein, to deliver and return to said T. H. Wegener, Trustee as aforesaid, all of the books, papers, personal property, and property of whatsoever kind or nature, held by them, or either of them, either as receiver, or otherwise, not specifically mentioned in the mortgage held by the plaintiff in the above-entitled proceedings and covered by the decree of the above-entitled court entered herein on or about April 20th, 1922.

And your petitioner will ever pray, etc.

BARGE E. LEONARD,
LESLIE J. AKER,
524 Idaho Building, Boise, Idaho,
Attorneys for T. H. Wegener, Trustee in Bankruptcy of Jordan Valley Farms, Bankrupt.

(Duly verified.)

Filed July 8, 1922. G. H. Marsh, Clerk. [54]

AND AFTERWARDS, to wit, on the 13th day of July, 1922, there was duly filed in said court an answer of E. M. Hoover, Trustee in Bankruptcy, to petition of J. Humfeld, receiver, for order allowing expenses and fixing compensation, in words and figures as follows, to wit: [55]

(Title of Court and Cause.)

Answer of E. M. Hoover, Trustee in Bankruptcy of Jordan Valley Land and Water Company, to Petition of J. Humfeld, Receiver.

COMES NOW E. M. Hoover, Trustee in Bankruptcy in the matter of the estate of Jordan Valley Land and Water Company, a bankrupt, and for answer to the petition of J. Humfeld for the approval of his account as receiver and for fixing his compensation as receiver in the above-entitled cause, admits, denies and alleges:

1. That on the 10th day of March, 1922, the defendant Jordan Valley Land and Water Company was declared and adjudged a bankrupt by the District Court of the United States for the District of Idaho, Southern Division, under the Acts of Congress relating to bankruptcy, and thereafter and on or about the 17th day of April, 1922, this answering defendant E. M. Hoover was duly appointed Trustee in the matter of the estate of said Jordan Valley Land and Water Company, a bankrupt, and thereupon and on the 18th day of April, 1922, this answering defendant E. M. Hoover accepted said trust

with all the duties and obligations pertaining thereunto and filed his oath as such trustee and executed and filed his bond in the sum of $5,000.00, which bond was duly approved on said 18th day of April, 1922, by R. M. McCracken, Esq., Referee in Bankruptcy for the Southern Division [56] of the District of Idaho and before whom said bankruptcy proceedings were pending, and this answering defendant, E. M. Hoover, ever since has been and now is the duly appointed, qualified, and acting trustee in the matter of the estate of said Jordan Valley Land and Water Company, a bankrupt.

2. Denies that said J. Humfeld was at any time appointed receiver for the above-named defendants, but this answering defendant upon his information and belief alleges that the said J. Humfeld was appointed receiver of the irrigation system of said Jordan Valley Land and Water Company for the sole purpose of operating and maintaining it pending the foreclosure of plaintiff's lien or mortgage sought to be foreclosed in this cause to the end that water might be delivered during the irrigation season of 1921, to the lands in cultivation under said irrigation system and covered by mortgages held by plaintiff, denies that said J. Humfeld had any authority or control as such Receiver, or otherwise over any of the assets, property or rights of said Jordan Valley Land and Water Company except as aforesaid, and denies that said J. Humfeld had any authority or power to negotiate for a sale of said assets or to collect or assemble the assets of said defendant or do any other act or thing than deliver

water to the lands under cultivation and embraced in the mortgages held by plaintiff as security for its claim against said Jordan Valley Land and Water Company.

3. This answering defendant is without information or knowledge as to whether the said J. Humfeld collected any revenues, maintenance charges or other charges from the persons to whom water was delivered by him or under his direction, and there fore denies said allegation in the petition, and this answering defendant further shows that if said J. Humfeld [57] operated said system at the expense alleged in his said petition and delivered water to the land owners situated thereunder without collecting any maintenance charges or any rental or other charge for such water then the said J. Humfeld was derelict in his duties as such receiver and failed to properly and efficiently perform his said duties, and the said J. Humfeld should be charged with the reasonable rental value of such water so delivered by him and be made to account therefor to this answering defendant as trustee in Bankruptcy of the estate of said Jordan Valley Land and Water Company.

4. Denies that all the liquid assets of the defendants are without the State of Oregon, but on the contrary this defendant alleges upon his information and belief that the said J. Humfeld without authority of law and without any order or authority from the court appointing him as receiver in this cause, attempted to collect and assemble the personal property and liquid assets of the said de-

fendants, and made claim thereto as Receiver, and that he, the said J. Humfeld, did assemble and receive and carry away or otherwise have delivered to him a large amount of personal property and other assets of the defendant Jordan Valley Land and Water Company, and as this defendant is informed and believes and so alleges the fact to be, the said J. Humfeld still holds possession of such personal property and has failed to account therefor, and this defendant further alleges that all of such personal property should be delivered to this defendant as Trustee in Bankruptcy.

5. As to whether the said J. Humfeld has made four or any other number of trips from Portland, Oregon, to Jordan Valley for the purpose of keeping in touch with said irrigation system, or otherwise, and as to whether the said J. Humfeld has made numerous or other trips to the capital of the State of [58] Oregon, or other places, while Receiver of said irrigation system, this answering defendant has no knowledge, information or belief on the subject, and therefore denies the same; and this answering defendant further alleges that it was wholly unnecessary for the said J. Humfeld as such Receiver to make said trips or incur any expenses in connection therewith; that a competent person to operate and maintain said irrigation system could be employed without the personal presence of said J. Humfeld on the irrigation system, and that such person could operate and maintain said system in a satisfactory and efficient manner without said trips being made by said J. Humfeld, and

this defendant further alleges upon his information and belief that the said J. Humfeld did not make any of said trips in the discharge of his duties as Receiver, but as the managing agent or representative of the said plaintiff and for the purpose of inspecting the security held by plaintiff and for the purpose of inducing prospective investors to purchase the securities held by plaintiff, and the expenses so incurred by the said J. Humfeld as agent and representative of plaintiff and in looking after plaintiff's interests and business, the said J. Humfeld is now attempting to charge to said receivership instead of to the said plaintiff, and the said J. Humfeld has included, as this answering defendant is informed and believes, and so alleges the fact to be, in his expense account disbursements and salaries incurred and paid by him, if at all, in maintaining plaintiff's office in the city of Portland, and in carrying on, conducting and looking after plaintiff's business in the making of mortgage loans in the Pacific Northwest.

6. Denies that said receivership has absorbed or should have absorbed a large measure of the time of said J. Humfeld, or has subjected said J. Humfeld to heavy burdens or [59] responsibilities, but on the contrary this answering defendant alleges the fact to be that the operation of said irrigation system from the 26th day of September, 1921, involved practically no time or burden or responsibility; that the irrigation season of 1921 was substantially concluded and at an end when the said J. Humfeld was appointed receiver, and a

suitable custodian such as usually employed by irrigation companies for looking after canals and ditches during the non-irrigating season could have been employed at not to exceed $90.00 per month; that during the winter season from November 1st to March 1st only nominal duties would be required of such custodian. That on the 10th day of March, 1922, the said Jordan Valley Land and Water Company was declared and adjudged a bankrupt as aforesaid, and thereupon the said J. Humfeld either as Receiver, or otherwise, lost all jurisdiction and control over said irrigation system, and this answering defendant upon his appointment as Trustee in said bankruptcy proceedings became entitled to the possession and control of said irrigation system and all property pretended to be held by said J. Humfeld as Receiver, or otherwise, but the said J. Humfeld has declined and refuses to surrender either the possession or control of said irrigation system or of any of said property so claimed to be held by him as Receiver to this answering defendant. That the said J. Humfeld should in no event and under no circumstances be allowed any compensation for services for himself or others employed or alleged to have been employed by him or any reimbursement for expenses incurred or alleged to have been incurred since the 10th day of March, 1922.

7. That the said J. Humfeld was appointed Receiver at his own instance and as managing agent for the said plaintiff and for the purpose of protecting the interests of said plaintiff, [60] and

the expenses of such receivership, as this answering defendant is informed and believes and so alleges the fact to be, should have been added to and included in the judgment or decree of plaintiff against the said defendants, and should have been made a lien against the securities held by plaintiff and described in its bill of complaint in this cause.

8. This answering defendant has no knowledge of the correctness of any of the items contained in plaintiff's account as set forth in his said petition, or of the necessity for incurring such or any expense, and placing its denial on that ground this answering defendant denies that the said J. Humfeld as Receiver incurred or should have incurred, or that there was any necessity for incurring any of the items of expense set forth in his said petition, and denies that said J. Humfeld is entitled to any compensation as Receiver.

E. M. HOOVER,
Trustee of the Estate of Jordan Valley Land and Water Company, a Bankrupt.

CHARLES E. WINSTEAD,
RICHARDS & HAGA,
Attorneys for E. M. Hoover, Trustee, etc.

(Duly verified.)

Filed July 13, 1922. G. H. Marsh, Clerk. [61]

AND AFTERWARDS, to wit, on the 14th day of July, 1922, there was duly filed in said court an answer of J. Humfield, Receiver, to petition of E. M. Hoover, trustee in bankruptcy, in words and figures as follows, to wit: [62]

(Title of Court and Cause.)

Answer of J. Humfeld to Petition of E. M. Hoover.

The answer of J. Humfeld, receiver of the above-named defendants, to the petition of E. M. Hoover, avers and denies as follows:

I.

The receiver believes the allegations of paragraph I to be true.

II.

The receiver believes the allegations of paragraph II to be true.

III.

The receiver believes the allegations of paragraph III to be true.

IV.

The receiver denies each and every allegation contained in paragraph IV, except that the receiver admits that the Jordan Valley Land & Water Company was and is the owner of certain assets which have been fully disclosed to this court in the several proceedings had herein. [63]

V.

The receiver denies each and every allegation contained in the fifth paragraph of the petition,

except that the receiver admits his appointment as alleged therein.

VI.

The receiver denies each and every allegation contained in paragraph VI of the petition.

For a further and affirmative answer the receiver avers that he has performed burdensome and valuable services and has incurred large expenses for the benefit of the defendant Jordan Valley Land & Water Company and of its creditors, all of which are fully and at large set forth in the petition of the receiver praying for allowances, which is on file in this court and cause and a copy of which has been served on counsel for the said E. M. Hoover.

WHEREFORE, the receiver prays that the allowances to be made the receiver for his services and disbursements be fixed by the court as a charge on the assets of Jordan Valley Land & Water Company, and that in case plaintiff be required to pay the same plaintiff be subrogated to the lien of the receiver by reason of such payment.

J. HUMFELD,
Receiver.

BRONAUGH and BRONAUGH,
McCAMANT and THOMPSON,
Solicitors for Receiver.

(Duly verified.)

Filed July 14, 1922. G. H. Marsh, Clerk. [64]

AND AFTERWARDS, to wit, on the 14th day of July, 1922, there was duly filed in said court an answer of J. Humfield, Receiver, to petition of T. H. Wegener, trustee in bankruptcy, in words and figures as follows, to wit: [65]

(Title of Court and Cause.)

Answer of J. Humfeld to Petition of T. H. Wegener.

The answer of J. Humfeld, receiver of the above-named defendants, to the petition of T. H. Wegener, avers and denies as follows:

I.

The receiver denies each and every allegation contained in the first paragraph of the petition, except that the receiver admits that he has certain assets of inconsequential value in his possession belonging to Jordan Valley Farms, all of which have been correctly stated by the receiver in the several proceedings had in this cause.

II.

The receiver admits the allegations of paragraph II.

III.

The receiver denies the allegations of paragraph III, except that the receiver believes that petitioner is the trustee in bankruptcy of the defendant Jordan Valley Farms.

For a further and affirmative answer the receiver avers that since his appointment he has performed burdensome services which have been of great value

to the defendant Jordan Valley Farms and to its creditors, and that he has disbursed considerable sums of money for the benefit of said corporation and in accordance with the orders of Court authorizing him so to do. That the facts with reference to the services and disbursements of the receiver are fully set forth in his petition for allowance on file herein and the receiver avers that the said [66] allowances should be made a charge on all of the assets of Jordan Valley Farms, and that plaintiff should be subrogated to the lien of the receiver in case plaintiff is required to pay the said charges, and that petitioner should not be permitted to receive any of the assets of the said defendant without fully compensating the receiver for the said charges and disbursements.

WHEREFORE, the receiver prays that he may be adequately protected in the matters set forth in his further and separate answer herein, and that the petition of T. H. Wegener may be denied.

J. HUMFELD,
Receiver.

BRONAUGH and BRONAUGH,
McCAMANT and THOMPSON,
Solicitors for Receiver.

(Duly verified.)

Filed July 14, 1922. G. H. Marsh, Clerk. [67]

AND AFTERWARDS, to wit, on the 14th day of July, 1922, there was duly filed in said court an answer of T. H. Wegener, trustee in bankruptcy, to petition of J. Humfield, Receiver, for order allowing expenses and fixing compensation, in words and figures as follows, to wit: [68]

(Title of Court and Cause.)

Answer of T. H. Wegener to Petition of J. Humfeld.

Comes now T. H. Wegener, Trustee in Bankruptcy of the Estate of Jordan Valley Farms, a bankrupt, and appearing specially herein for the purposes hereinafter set forth, makes answer to the petition of J. Humfeld for the approval of his account as Receiver, and fixing his compensation as Receiver in the above-entitled cause, and requesting that such fees allowed to him as Receiver be impressed as a lien against the property and assets now held by him belonging to the Trustees in Bankruptcy of the Estates of Jordan Valley Farms, and the Jordan Valley Land and Water Company, bankruptcy and admits, denies and alleges as follows, to wit:

I. Alleges that on the 10th day of March, 1922, the defendant, Jordan Valley Farms was duly declared and adjudged a bankrupt by the District Court of the United States for the District of Idaho, Southern Division, under the Acts of Congress relating to bankruptcy, and thereafter and on the 17th day of April, 1922, this answering peti-

tioner, T. H. Wegener, was duly appointed and elected Trustee in bankruptcy of the Estate of Jordan Valley Farms, a bankrupt, and thereupon, and on the said 17th day of April, 1922, the said T. H. Wegener accepted said trust with all the duties and obligations pertaining thereto, and filed his oath as such Trustee and executed and filed his bond in the sum of $2,500.00, which bond was duly approved on the said 17th day of April, 1922, by R. M. McCracken, Esq., Referee in Bankruptcy for the Southern Division of the District of Idaho, before whom said bankruptcy proceedings were pending, and this answering petitioner, T. H. Wegener, ever since has been and now is the duly appointed, qualified and acting [69] Trustee in bankruptcy of the said Estate of Jordan Valley Farms, a bankrupt.

II. Alleges that J. Humfeld, Receiver as aforesaid and petitioner herein, attended the first meeting of creditors of the said Jordan Valley Farms, bankrupt, and also of the said Jordan Valley Land and Water Company, bankrupt, held at the office of R. M. McCracken, Esq., Referee in Bankruptcy, in the Empire Building, Boise, Idaho, on the said 17th day of April, 1922, and while in attendance thereat, offered and agreed to turn over to the respective Trustees in bankruptcy for the said Jordan Valley Farms and the Jordan Valley Land and Water Company, all the assets, securities and property then held by him as Receiver, which were not covered by the mortgage of the said Mortgage Company for America or held as

collateral thereto, without any reservation as to lien for Receiver's fees, or otherwise or at all.

III. That the said J. Humfeld has entirely failed, neglected and refused to turn over and deliver to the said respective Trustees in Bankruptcy any of the property or assets belonging thereto, although proper demand was made therefor, and still refuses so to do, in spite of the decision of this court, providing for the return of such assets and securities to the said bankrupt estates, and contrary to his promise and agreement made at the meeting of creditors so to do.

IV. Denies that the said J. Humfeld ever made proper application upon proper notice to the defendants hereinabove named, or otherwise or at all, for appointment as Receiver for the said defendants, or that the said J. Humfeld was ever at any time appointed Receiver for the said defendants; denies that the said Jordan Valley Land and Water Company had ceased to function, or that the irrigation system owned by it was liable to damage, deterioration and destruction for lack of care, but that the said J. Humfeld, as Trustee for said bankrupt companies, was at all times in full charge of said irrigation system prior to such receivership, and any improper handling of such project, damage thereto, [70] deterioration or destruction thereof for lack of care or otherwise, or the failure on the part of said Jordan Valley Land & Water Company to function, if any there was, was and is directly chargeable to the said J. Humfeld, Trustee for said companies, and resulted in a breach of such

trust on his part, of which he should not have been at any time permitted to take advantage of.

V. Admits that the said J. Humfeld took possession of the irrigation system of the Jordan Valley Land and Water Company, but denies, on information and belief, that he has provided the moneys necessary for its maintenance and care during any of the time that has intervened since his appointment, or otherwise or at all; and alleges that practically all the maintenance and care given to said irrigation system during the incumbency of said J. Humfeld as receiver was provided for by the settlers composing the Jordan Valley Water Users' Association, without compensation or assistance of said J. Humfeld, as receiver or otherwise. This petitioner is without information or knowledge sufficient to form a belief as to whether the said J. Humfeld collected any revenues, maintenance charges or other charges from the persons to whom water was delivered while he was in possession of said irrigation system; but your petitioner alleges that if said J. Humfeld operated said system at the expense alleged in his said petition and delivered water to the land owners situated thereunder without collecting any maintenance charges or rental or other charge for such water, then the said Humfeld was derelict in his duties and obligation as such receiver, and failed to properly and efficiently perform his said duties, and should be charged with reasonable rental value of such water so delivered by him and be made to account therefor to this petitioner and the trustee for the Jordan Valley

Land and Water Company. Your petitioner denies that the said J. Humfeld has been obliged to provide for any funds necessary for the maintenance and care of said water system or to take care of any miscellaneous receivership expenses as set forth in his petition, or otherwise or at all. [71]

VI. Denies that all the liquid assets of the defendants named are without the State of Oregon, but on the contrary, this answering petitioner alleges, upon his information and belief, that the said J. Humfeld, as agent for the Mortgage Company for America, upon the representation that he would secure and advance to the said defendant companies sufficient moneys to finish the construction of the irrigation project in question, secured possession under the guise and name as trustee for said defendant companies of all the liquid assets, securities, personal property, notes, mortgages, deeds, books, papers, contracts, of every kind and description which the said defendant companies owned or had in their possession, in addition to those securities held by him, as agent for the Mortgage Company for America, under its mortgage, and after his nonfulfillment of his obligation as such trustee, failed and neglected to return the said property and assets to the respective companies, but continued to hold the same under the guise and name of receiver of said companies without authority of the law, and without any proper order or authority of any court, and constituting the most flagrant breach of trust and violation of his obligation and duties to the *cestui que* trust; and that the said J. Humfeld still

continues to hold possession of the same, contrary to law, and in opposition to the demands and claims of the bankrupt estates hereinbefore mentioned.

VII. Denies, upon information and belief, that the said J. Humfeld made four trips from Portland, Oregon, to Jordan Valley for the purpose of keeping in personal touch with the irrigation system, or that he has also made numerous trips to the state capital for the purpose of interviewing the State Engineer and avoiding, if possible, the forfeiture of the irrigation system to the State of Oregon for lack of compliance by the defendant, Jordan Valley Land and Water Company with the terms and provisions of the contract with the state, or otherwise or at all, except as the managing agent or representative of the Mortgage Company for America he may have made some of the trips mentioned in his petition [72] for the purpose of inspecting the security held by said plaintiff and to protect the same from forfeiture, or for the purpose of inducing prospective investors to purchase the securities held by said plaintiff; and that all of such expenses, if incurred, were incurred entirely by the said J. Humfeld in looking after plaintiff's interest and business, and are not properly chargeable as receivership expenses in this matter.

VIII. Denies that the said J. Humfeld employed any help other than one Charles Lanning to remain on the ground and look after the irrigation system, or that he raised the funds necessary to pay such expenses of such help, other than what the settlers on such project may have contributed for such purpose.

Alleges that the said J. Humfeld included in his expense account the salaries and disbursements made by him or incurred by him in maintaining the office of the Mortgage Company for America in the City of Portland, and in carrying on, conducting and looking after the extensive business of said plaintiff and his own personal interests throughout the Pacific northwest, and that none of such salaries of relatives of said J. Humfeld should be charged against the bankrupt estates, or otherwise or at all

IX. Denies that because of the efforts of J. Humfeld, the irrigation system has been maintained intact and the value of the farming land under the ditch has not been lost, or that the so-called receivership has preserved any valuable assets of the Jordan Valley Land & Water Company for the benefit of that corporation or the Jordan Valley Farms, or the creditors of either of them, or that it has been effectual in preserving the value of the lands which are pledged to plaintiff through the mortgages described in the complaint, which plaintiff purchased at a nominal price on foreclosure sale held on June 23d; but alleges that, through the pretensions he has made as to being general receiver for the said bankrupt corporations, and his failure and refusal to deliver over to them the assets and property properly belonging to the said trustees and the possession and control of said irrigation project, he has usurped the powers and duties of the two trustees in bankruptcy and has rendered them [73] powerless to act for the best interests of the creditors of the two bankrupt corporations; that the said J. Humfeld,

pretending to act on behalf of the general creditors of the two bankrupt corporations, failed to make proper legal protest against the forfeiture of said irrigation project by the State of Oregon, or take injunctive or other legal measures to prevent the same, thereby permitting an irreparable loss to the general creditors and stockholders of the two bankrupt corporations; and that the said J. Humfeld so neglected his pretended duties as receiver in possession of said irrigation system that only a nominal amount was credited against the sale of the valuable securities held by his employer the Mortgage Company for America, and now claims a large deficiency judgment against the general assets of the two corporations.

X. Denies that said J. Humfeld has made earnest effort to interest purchasers in the property but that he has been greatly handicapped in that regard by the bankruptcy proceedings, or in any other way; and denies that the receivership has absorbed a large measure of the time of said J. Humfeld, or has subjected him to heavy burdens and responsibilities, or that he has discharged any of such responsibilities to the best of his ability in any other respect than to secure as much property, money and assets for himself and his employer, the Mortgage Company of America, to the detriment of the general creditors of said two bankrupt companies and the irrigation project in general.

XI. Admits that the irrigation system, if appraised in the light of its cost or its replacement value, would be worth at least a quarter of million

of dollars if not more; and this answering petitioner alleges that due to the wrongful breach of trust on the part of said J. Humfeld, first as trustee for the two said bankrupt companies, and then in usurping the rights of a general receiver for said companies, he has destroyed all possible chance of the two bankrupt companies completing such project, thereby bringing on the forfeiture action of the State of Oregon, under which all of the assets of said two companies were attempted to be transferred to the Jordan Valley Irrigation District for a nominal sum, and thereby rendering the assets of said bankrupt companies of very [74] little value, without considerable litigation to determine the rights of the two companies thereto; and that said J. Humfeld has practically permitted the project in question to be run by itself, or with such volunteer aid as the settlers thereon may have rendered, and that deterioration, ruination and destruction has been permitted by him, while the said irrigation system has been in his possession all of which wrongful acts and neglect have brought about a situation whereby the said J. Humfeld and the said Mortgage Company for America hope to profit tremendously thereby by taking over through foreclosure proceedings and sale of the securities in his possession nearly all the lands located in said project and the irrigation system thereof, to the exclusion of the rights of the creditors of the two bankrupt corporations and the settlers of the irrigation project.

XII. That the said J. Humfeld was appointed Receiver at his own instance, and as managing agent

for the said plaintiff, for the sole purpose of protecting the interests of said plaintiff, and the expenses of such receivership, if any may be considered proper, should have been added to and included in the judgment or decree of plaintiff against the defendants, and should not be claimed as a lien against the securities held by said Humfeld, which were not covered by his mortgage and foreclosure proceedings.

XIII. This petitioner denies the correctness of the items contained in plaintiff's account as set forth in his said petition, and denies the necessity for incurring such or any expense as therein set forth, and denies that said J. Humfeld is entitled to any compensation as Receiver or otherwise or at all.

WHEREFORE, your answering petitioner respectfully prays that the said petition of J. Humfeld for allowance of Receiver's fees and expenses be denied and disallowed, and that no lien therefor may be allowed against the assets of the defendant corporations now in bankruptcy, other than those covered by the mortgage of said plaintiff and foreclosure proceedings thereon, or that such assets be withheld from the Trustees [75] in bankruptcy of said defendant corporations until such claimed lien is paid or otherwise or at all; and your petitioner further prays the Court for an order requiring the said J. Humfield, Receiver, and the Mortgage Company for America, and all others, claiming by, through or under them, to deliver forthwith to the said T. H. Wegener, Trustee in Bankruptcy for

Jordan Valley Farms, and to E. M. Hoover, Trustee for the Jordan Valley Land & Water Company, all assets of every kind and nature whatsoever, consisting of contracts, notes, mortgages, deeds, books, papers, office furniture and equipment, maps, profiles, and other property, heretofore taken by the said J. Humfield in his possession as Trustee, a partial list of which is on file in these proceedings, as interest therein and thereto may appear; and your petitioner prays for such other and further relief in the premises as to equity may pertain.

T. H. WEGENER,

Trustee in Bankruptcy of the Estate of Jordan Valley Farms, a Bankrupt.

BARGE E. LEONARD,
LESLIE J. AKER,

Attorneys for T. H. Wegener, Trustee.

(Duly verified.)

Filed July 14, 1922. G. H. Marsh, Clerk. [76]

AND AFTERWARDS, to wit, on Friday, the 14th day of July, 1922, the same being the 10th judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [77]

(Title of Court and Cause.)

Order on Petition of Receiver and Petitions of E. M. Hoover and T. H. Wegener, Trustees in Bankruptcy.

This cause coming on to be heard on the petition of J. Humfeld, Receiver, for the approval of his accounts and the making of allowances reasonable to be made to him for the services rendered by him and for his protection in the matter of his disbursements and his compensation, and also on the petitions of E. M. Hoover, trustee in bankruptcy of Jordan Valley Land & Water Company, and T. H. Wegener, trustee in bankruptcy of Jordan Valley Farms, and the receiver appearing by Earl C. Bronaugh and Wallace McCamant, his attorneys, E. M. Hoover, trustee in bankruptcy aforesaid, appearing by Richards & Haga, his attorneys, and T. H. Wegener, trustee in bankruptcy as aforesaid, appearing by L. J. Aker, his attorney, and the parties having reached an agreement thereon and the Court being fully advised by agreement of the parties:

IT IS CONSIDERED, ORDERED AND ADJUDGED, that the receiver be allowed the sum of $3,500 for his services rendered as receiver of Jordan Valley Land & Water Company and $750 for his services as receiver of Jordan Valley Farms.

IT IS FURTHER ADJUDGED, that the receiver be allowed the sum of $3,233.43 disbursed by him as receiver of Jordan Valley Land & Water Company and the sum of $860.05 disbursed by him as receiver of Jordan Valley Farms. [78]

IT IS FURTHER ADJUDGED, that the receiver be allowed the additional sum of $750 for the services of his attorneys.

The plaintiff having asked for the appointment of a receiver, IT IS ORDERED, that these allowances be paid by plaintiff and that on such payment plaintiff be subrogated to the rights and lien of the receiver.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the allowances of $750 for services and $860.05 for disbursements made to J. Humfeld as receiver of Jordan Valley Farms be and they are charged as a lien on the assets of the said defendant, and it is adjudged that the receiver retain possession of the said assets until the allowances so made shall be paid. The receiver is permitted, however, to surrender the said assets on receipt of a bond satisfactory to him guaranteeing the payment within a reasonable time of the said allowances.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the sum of $3500 allowed the receiver for his services and $3233.43 for his disbursements, and the additional sum of $750 allowed him for the services of his attorneys, be and they are charged as a lien on the assets of the defendant Jordan Valley Land & Water Company and it is adjudged that the receiver retain possession of the properties of the said defendant until the allowances so made shall be paid.

It appearing to the Court that the property which can be irrigated by the irrigation system referred

to in the pleadings and decree herein is now situate within an irrigation district known as Jordan Valley Irrigation District.

IT IS CONSIDERED, ORDERED AND ADJUDGED, that the receiver be and he is hereby authorized and permitted without expense to the estate to arrange with the said district for the care of the system, without surrender, however, of the [79] possession thereof by the receiver, the Court retaining possession of the system and of the assets of the several companies to secure the allowances so made to the receiver for his services and disbursements and for the services of his attorneys.

IT IS ORDERED, that the receiver be and he is hereby directed to turn over to the respective trustees in bankruptcy aforesaid the assets of the defendants, when the said charges herein provided for shall have been paid in full, and not otherwise.

CHAS. E. WOLVERTON,
Judge.

Dated July 14th, 1922.

Filed July 14, 1922. G. H. Marsh, Clerk. [80]

AND AFTERWARDS, to wit, on the 18th day of October, 1922, there was duly filed in said court a petition of plaintiff for order directing the Receiver to sell assets, in words and figures as follows, to wit: [81]

(Title of Court and Cause.)

Petition of Mortgage Company for America for Order Directing Receiver to Sell Property.

To the Honorable CHARLES E. WOLVERTON and ROBERT S. BEAN, Judges of the Above-entitled court:

The above-named plaintiff, Mortgage Company for America, presents this, its petition, and shows unto the Court that pursuant to the order of the Court duly passed on July 14th, 1922, wherein the Court ordered that certain allowances be made to the Receiver for his services as receiver of the defendant corporations and for disbursements made by him as Receiver for the account of said defendant corporations in the operation of the receivership, and for attorneys' fees for the services of attorneys for the Receiver, the plaintiff did, in obedience to the provisions of said decree ordering that such allowances be paid by the plaintiff, and that on said payment plaintiff be subrogated to the rights and liens of the Receiver, make payment of all of the allowances aforesaid so made by the said order of July 14th, 1922; that the defendants have failed to pay the said allowances and that the respective trustees in bankruptcy for the defendant corporations have failed to pay the same, or any part thereof; that under the provisions of the said order of Court, the plaintiff is entitled to be reimbursed for the payment by it of such advances to the Receiver. [82]

The plaintiff therefore prays that an order of the Court be made directing the Receiver to sell all of the assets of the defendant corporations, and each of them, in his custody as Receiver, and that the proceeds of sale be applied towards the reimbursement of the plaintiff to the receiver, and his attorneys, and that such other and further order may be made in the premises as to the Court shall seem meet and equitable.

McCAMANT & THOMPSON,
BRONAUGH & BRONAUGH,
Attorneys for Plaintiff.

(Duly verified.)
Filed October 18, 1922, G. H. Marsh, Clerk. [83]

AND AFTERWARDS, to wit, on the 30th day of October, 1922, there was duly filed in said court an affidavit of E. M. Hoover, in words and figures as follows, to wit: [84]

(Title of Court and Cause.)
United States of America,
District of Idaho,
County of Ada,—ss.

Affidavit of E. M. Hoover.

E. M. Hoover, being first duly sworn, upon his oath deposes and says:

That he now is and ever since on or about the 18th day of April, 1922, has been the duly elected, qualified and acting trustee in bankruptcy of the assets and estate of the Jordan Valley Land and Water

Company, one of the defendants above named; that said Jordan Valley Land and Water Company was adjudged a bankrupt within the true intent and meaning of the Act of Congress relating to bankruptcy on the 10th day of March, 1922, by the District Court of the United States for the District of Idaho, Southern Division, and on said date an order was duly made and entered by said Court adjudging said Jordan Valley Land and Water Company a bankrupt; that thereafter and on the 17th day of April, 1922, this affiant at a meeting of the creditors of said bankrupt duly called and held pursuant to [85] notice, was appointed trustee in bankruptcy of the estate of said bankrupt; that your petitioner immediately accepted said trust with all the duties and obligations pertaining thereto, and on the 18th day of April, 1922, made and filed his bond as trustee in said bankruptcy proceedings, which bond was duly approved by R. M. McCracken, Esq., Referee in Bankruptcy, residing at Boise, Idaho, and before which referee said bankruptcy proceedings were pending; that as affiant is informed and believes and so alleges the fact to be, the estate of said bankrupt consists almost entirely, if not wholly, of an irrigation system in Malheur County, Oregon, and certain farm lands in said county and state, and equities in certain mortgages and water contracts obtained from the sale of water rights in said irrigation system; that substantially all of said property was, at the time that this affiant was appointed trustee in bankruptcy as aforesaid, claimed by one J. Humfeld, as Receiver under an

order made in the above-entitled cause; that said J. Humfeld is and was at the time, as this affiant is informed and believes and so alleges the fact to be, the managing agent of the said plaintiff, and was acting or pretending to act as receiver in aid of plaintiff's suit for foreclosure on some of said mortgages, notes and other personal property pledged to plaintiff, as this affiant is informed and believes, as security for money borrowed by the defendants.

That on or about the 14th day of July, 1922, the said J. Humfeld, Receiver, made application to this Honorable Court for the approval of his report as receiver and for an allowance of his accounts and his fees as receiver and the fees of his counsel; that this affiant as trustee in bankruptcy filed an answer to said application, to which answer [86] this affiant now begs leave to refer for a full and complete statement of the facts therein set forth and the issues made by this affiant on the said application of said receiver, and affiant makes said answer a part of this affidavit with the same force and effect as if the same were hereto attached and made a part hereof; that immediately prior to said application coming on for hearing before this Honorable Court a conference was held, as this affiant is informed and believes and so alleges the fact to be, attended by said receiver and by his counsel and by the officers and counsel of the Jordan Valley Irrigation District and by T. H. Wegener, trustee in bankruptcy of the defendant Jordan Valley Farms, and by L. J. Aker, his counsel, and by J. H.

Richards of counsel for this affiant, but this affiant was not present at said conferences and had no knowledge thereof until long after the same had been held; that this affiant is informed and believes and upon his information and belief alleges that at said conferences an effort was made by the said J. Humfeld and his counsel to effect a settlement or compromise regarding his fees and allowances so as to obviate the necessity of making proof thereof and so as to avoid a contest thereof in court; that said Jordan Valley Irrigation District being desirous of acquiring said irrigation system and the mortgages and water contracts held by said receiver, agreed with said receiver and with the others participating in said negotiations, as aforesaid, that it would pay the full amount of plaintiff's claim including the fees and charges of said receiver and his counsel and the amount stipulated to be paid in the said order made on July 14, 1922, in this cause, making in the aggregate approximately $117,000.00, and that it would make such payment on or before the —— day of December, [87] 1922, and the said receiver and the said plaintiff agreed to accept said payment in full satisfaction and discharge of all their claims against the defendants and the property and assets in the possession of said receiver, or upon which a lien was claimed by plaintiff, and said receiver in said cause, and to give said irrigation district until the —— day of December, 1922, to make such payment; that because of said agreement between plaintiff and the receiver on the one hand and said

irrigation district on the other, the said plaintiff and said J. Humfeld and their counsel persuaded all parties to waive any objection to the allowance of the fees and charges of said receiver and to the approval of his accounts; that thereupon and upon the assurance that no part of said charges, fees and claims would have to be paid out of the estate of said bankrupts but would be paid by said Jordan Valley Irrigation District and that upon such payment the said irrigation system and other property not to be delivered to said irrigation district would be delivered to the respective trustees in bankruptcy, and not otherwise, counsel for said trustee waived the objections made and issues raised by this affiant in his said answer, filed as aforesaid, and consented to the allowance of the claims, charges and fees of said receiver and to his possession of the property belonging to the estate of said bankrupt, as provided in said order of July 14, 1922.

That this affiant did not learn of said order or of said compromise and settlement and of the waiver of the said answer until long after the same had been made and the same has never been approved by this affiant or by the creditors of said Jordan Valley Land and Water Company or by the said referee in bankruptcy or by the said bankruptcy court for the District of Idaho; that such attempted settlement and adjustment [88] in so far as it purported to create a prior lien upon the estate of said bankrupt in favor of plaintiff or the said receiver was and is, as this affiant is informed and

believes and so alleges the fact to be, unauthorized and void and not binding upon the estate of said bankrupt and was consented to by counsel for this affiant solely upon the assurance that said irrigation district would pay said claims and that plaintiff and said receiver would give said district until on or about the —— day of December, 1922, in which to make such payment, and that such claims, fees and charges would not under any circumstances have to be paid by said bankrupt estate, and that the same would not under any circumstances result in a sacrifice of said estate or in a sale thereof to satisfy the claims of said plaintiff and said receiver.

That said irrigation district has taken up negotiations with this affiant for the purchase of the interest of said bankrupt in said irrigation system for an amount that will pay substantially the face value of the claims filed against said estate in said bankruptcy proceedings, to wit, approximately $42,000.00, but such negotiations have not been concluded and a binding and effective contract has not as yet been entered into; that said district has taken the necessary proceedings as affiant is informed and believes and so alleges the fact to be, to issue and sell its bonds so as to pay the claims of said receiver and of said plaintiff to be paid under the said agreement entered into as aforesaid on or about July 14, 1922, and if the sale now prayed for by the plaintiff is deferred, affiant on its information and belief alleges that the said District will pay the full amount which said plaintiff and

said receiver agreed to accept in satisfaction and discharge of their said claims, fees and charges within the [89] time agreed upon as aforesaid; that plaintiff's application for a sale under said order of July 14, 1922, at this time is made, as this affiant is informed and believes, and so alleges the fact to be, at the instance and request of said irrigation district and its representatives who seek by this method to avoid the necessity of purchasing the estate and interest of said bankrupt in said irrigation system and property, and said attempted sale is for the purpose of vesting in said irrigation district title to said property without the necessity of purchasing or acquiring through negotiations with this affiant the estate which he represents and is in effect a fraud upon said bankrupt estate and upon the creditors of said bankrupt and is in violation of the agreement entered into on July 14, 1922, and upon which the said order of July 14 was based; that to permit the said sale to be made would be to assist in carrying out of an unconscionable fraud upon said bankrupt and the creditors thereof; that this affiant has no funds with which to protect said property in the event of a sale and said property will be purchased, as this affiant is informed and believes and so alleges the fact to be, at a nominal price by said irrigation district, which amount will be credited upon the amount it is to pay the said plaintiff and said receiver under said agreement of July 14, 1922, and after having acquired such interest under said receiver's sale, the said district will attempt to avoid

the payment of any sum whatsoever to this affiant or the creditors of said bankrupt, but will seek to eliminate the interest of said bankrupt estate in said property by the sale sought to be made under plaintiff's application herein.

That in order to properly protect the estate of said bankrupt and the creditors thereof, the order made as aforesaid [90] on July 14, 1922, should either be set aside and annulled and this affiant be given an opportunity to contest the fees, claims, charges and accounts of said receiver and to be heard as to the nature of the order, if any, that should be entered in the premises, or the hearing on the necessity for the issuance of an order of sale such as is now prayed for by plaintiff should be postponed and deferred until it is known whether the said irrigation district will carry out its said agreement and pay the claims and charges of plaintiff hereinbefore referred to, and in the event such payment be made, there will be no necessity for any hearing or for any order in the premises.

That relying upon the said agreement of said irrigation district and of said plaintiff and said receiver to make settlement of all of said claims in the manner hereinbefore set forth, this affiant has not heretofore taken any steps to have this order vacated, for he verily believed that said irrigation district would pay said claims as it has repeatedly assured this affiant and his attorneys that it would, and this affiant has taken no further action to secure possession of such property for he believed that upon such payment being made the property

to which he is entitled would be turned over to him by plaintiff and said receiver as provided in the said order.

E. M. HOOVER.

Subscribed and sworn to before me this 28th day of October, A. D. 1922.

[Seal] J. L. EBERLE,

Notary Public for the State of Idaho, Residing at Boise, Idaho.

Filed October 30, 1922. G. H. Marsh, Clerk. [91]

AND AFTERWARDS, to wit, on the 30th day of October, 1922, there was duly filed in said court an affidavit of J. H. Richards, in words and figures as follows, to wit: [92]

(Title of Court and Cause.)

Affidavit of J. H. Richards.

United States of America,
District of Idaho,
County of Ada,—ss.

I, J. H. Richards, being first duly sworn, upon my oath depose and say:

That I am an attorney at law residing at Boise, Idaho, and a member of the firm of Richards & Haga; that I attended the hearing in the above-entitled cause held on the 14th day of July, 1922, on the application of J. Humfeld, Receiver, for the approval of his accounts and the allowance of his fees and charges as receiver in said cause; that

immediately prior to the hearing in court on said matter conferences were held and negotiations carried on between the officers of and the attorneys for the Jordan Valley Irrigation District and the said plaintiff and its attorneys and the said J. Humfeld and his attorneys in which I participated and in which also T. H. Wegener, trustee in bankruptcy of the Jordan Valley Farms and L. J. Aker, his attorney, participated; that said conferences were sought by plaintiff [93] and said receiver and their attorneys for the purpose of avoiding any contest in court on the accounts, claims, fees and charges of said receiver; that it was the purpose of said irrigation district to acquire the said irrigation system and also the water contracts and mortgages covering water rights which plaintiff had foreclosed upon in this cause and sold prior to such hearing and bid in by plaintiff in satisfaction or partial satisfaction of its judgment; that it was agreed between plaintiff and said receiver and said irrigation district and its representatives that plaintiff would sell and deliver said mortgages and water contracts to said district for $117,000.00, which was the full amount of plaintiff's claim including the fees, charges and disbursements of the receiver and the fees and charges of his attorneys and that said district should have until the —— day of December, 1922, in which to make such payment; that said district desired to acquire said contracts and mortgages for the reason that they covered lands in said district and were given in payment of water rights, and said district desired to cancel said

contracts so that the bonds of the district might be issued and apportioned against said lands in payment of such water rights.

That in view of such agreement and the assurance that no action would be taken for the sale of the property of the bankrupts or the enforcement of any order fixing such fees but that all of said indebtedness to plaintiff and receiver would be paid by such district, I consented to the order made on July 14, 1922, without making any contest on behalf of said E. M. Hoover, Trustee, because under said agreement it was immaterial to the trustee and the estate of the bankrupt what allowance was made to such receiver and what order was made in the premises; that the attempt to sell the said irrigation system or the property of the bankrupt under said order at this time is in direct violation of the agreement upon which I consented to said order, and if [94] such sale be now made it will result in a sacrifice of the estate of said bankrupt and will, in my opinion, destroy all possibility of the creditors of said bankrupt receiving any pay whatever on their claims against such bankrupt; that I had no intention in consenting to said order of imperiling or jeopardizing the estate of the bankrupt for which said Hoover was trustee, but I verily believed that said agreement would be carried out in good faith and that when so carried out all interests would be protected and that as a result of such agreement a contest would be avoided and the estate of the bankrupt preserved and protected as completely as if said contest had been

made and decided in favor of the estate of said bankrupt; that since said agreement was made and from time to time until the present time the District has manifested an intention of carrying out said agreement and has carried on negotiations for the purchase of the interest and estate of E. M. Hoover, trustee in said irrigation system for a price that would pay the claims filed in bankruptcy against said estate; that I am informed and believed that the attempt to sell under the order made on July 14th is solely for the purpose of enabling said irrigation district to get title to said irrigation system and property through the receiver's sale without purchasing the interest of the trustee in bankruptcy therein through him or through the negotiations that have been carried on with that in view, and that if such sale is made the trustee in bankruptcy will be unable to protect the interest of said creditors and such sale will result in defeating their rights and leave said estate without means or assets to pay such creditors; that said district, as I am informed and believe, is selling its bonds and will soon be in condition to pay the claim of plaintiff and [95] said receiver in accordance with said agreement on which said order is based, but if said sale be made at this time it will result in a gross fraud upon the rights of the creditors in the bankruptcy proceedings.

J. H. RICHARDS.

Subscribed and sworn to before me this 28th day of October, 1922.

[Seal] J. L. EBERLE,

Notary Public for the State of Idaho, Residing at Boise, Idaho.

Filed October 30, 1922. G. H. Marsh, Clerk. [96]

AND AFTERWARDS, to wit, on the 30th day of October, 1922, there was duly filed in said court an affidavit and petition of Leslie J. Akers to set aside order allowing Receiver's fees, etc., in words and figures as follows, to wit: [97]

(Title of Court and Cause.)

Affidavit and Petition of Leslie J. Aker to Set Aside Order Allowing Receiver's Fees.

To the Honorable CHARLES E. WOLVERTON and ROBERT S. BEAN, Judges of the Above-entitled Court:

United States of America,
District and State of Idaho,
County of Ada,—ss.

I, Leslie J. Aker, being first duly sworn, depose and say:

That I am one of the attorneys for T. H. Wegener, Trustee in Bankruptcy of the Estate of Jordan Valley Farms, a corporation, bankrupt, and, as such attorney, voluntarily appeared in the District Court of the United States, for the District of Oregon, in the matter of the hearing upon

the petition of J. Humfeld, Receiver, for the approval of his accounts and the making of allowances for services, claimed to be rendered by him, which was set for hearing at the courtroom of said court in the Federal Building at Portland, Oregon, on the 14th day of July, 1922.

That the said T. H. Wegener, Trustee in bankruptcy, of Jordan Valley Farms, as aforesaid, and his attorneys, having previously filed a verified protest against the allowance to the said J. Humfeld, receiver, or otherwise, any compensation whatsoever, were prepared to contest any effort made upon the part of the said J. Humfeld, receiver as aforesaid, to charge as a lien, or otherwise, against the assets belonging to the Jordan Valley Farms, bankrupt, any [98] receiver's fees, expenses, or charges whatsoever. Before the said matter was called for hearing in said court, Judges Earl C. Bronaugh and Wallace McCammant, attorneys for the said J. Humfeld, receiver, proposed to Judge J. H. Richards, of counsel for the Jordan Valley Land & Water Company, bankrupt, and Judge William Morgan, of counsel for the Jordan Valley Irrigation District, appearing informally in said proceedings, as well as myself, that an effort be made to compromise the differences between the parties concerned. That the other attorneys opposed to the allowance of said receiver's fees, hereinbefore named, agreed to make such effort at compromise, and this deponent reluctantly also participated therein.

As a result of such negotiations for compromise, it was agreed in open court, before the Hon. C. E. Wolverton, District Judge, that the Jordan Valley Irrigation District would, within a reasonable time, to be agreed upon between the said district and said J. Humfeld, as receiver, and agent for the Mortgage Company for America, plaintiff in the above-entitled suit, pay to the said J. Humfeld, the lump sum of $117,000.00 in full settlement of the above-entitled foreclosure suit and also for all charges of the said J. Humfeld for receiver's fees, attorneys' fees, and expenses; and upon the assurance of the said Judge William Morgan, appearing on behalf of the said Jordan Valley Irrigation District, as well as representatives of the Board of Directors of the said Jordan Valley Irrigation District, that were present that they would pay off said obligations in full in due course of time without cost or expense to the said bankrupt estate, or trustees in bankruptcy thereof, this deponent as attorney for T. H. Wegener, trustee in bankruptcy of Jordan Valley Farms, and Judge J. H. Richards as attorney for E. M. Hoover, trustee in bankruptcy of the Jordan Valley Land & Water Company, with the understanding, and under the conditions hereinbefore stated, that the said receiver's fees for both bankrupt companies would be paid by the said Jordan Valley Irrigation District, consented to the making and entry of the order made in the above-entitled suit under date of July 14th, 1922, subject to the approval of the creditors and the bankruptcy court. [99]

That as your deponent is informed and verily believes, the said Jordan Valley Irrigation District, has made written agreement with the said J. Humfeld, receiver and agent for the Mortgage Company for America, plaintiff, in the above-entitled suit for the payment of the whole sum of $117,000.00 in accordance with such compromise settlement sometime during the month of December, 1922, or as soon as money may be realized upon said Irrigation District bonds, sufficient to pay the same, and that the said Jordan Valley Irrigation District, through it attorneys and representatives have assured this deponent of its ability and intention to fully carry out the terms of its agreement with the said J. Humfeld, receiver, and also with the respective trustees in bankruptcy of the Jordan Valley Farms and the Jordan Valley Land & Water Company, and that all receiver's fees, charges and expenses as set forth in that certain order of the above-entitled court, under date of July 14th, 1922, was and is to be included in such payment.

That the petition filed herein, on or about October 18th, 1922, verified by J. Humfeld, as the agent for the Mortgage Company for America, and signed by Messrs. McCammant and Thompson, and Bronaugh and Bronaugh, attorneys for the plaintiff, together with the notification of a hearing thereon, on October 23d, 1922, postponed until October 30th, 1922, was and is a complete surprise to this deponent as attorney for the trustee in bankruptcy of Jordan Valley Farms, as well as to other

parties similarly interested and participating in the compromise settlement made before the above-entitled court in July, 1922, and this deponent alleges and states, without qualification that the action taken by the attorneys for said J. Humfeld, receiver, is an absolute and unconditional breach of the conditions and terms of the compromise settlement reached in the above-entitled suit in open court before the Hon. Charles E. Wolverton, District Judge, and comprises an effort to foreclose and dispose of assets and securities belonging to the respective trustees in bankruptcy as [100] aforesaid, aggregating several hundred thousand dollars, at a forced sale whereat the said J. Humfeld, receiver, would undoubtedly be the only bidder, leaving the creditors of the two bankrupt companies without any assets or recourse whatsoever to recover their claims aggregating over $100,000.00.

That, inasmuch as the said J. Humfeld, receiver, and agent for the Mortgage Company for America, plaintiff, have absolutely failed and refused to comply with the terms of the compromise settlement hereinbefore set forth, this deponent as representative of the trustee in bankruptcy for Jordan Valley Farms, desires upon behalf of said trustee in bankruptcy, and as representative of a majority of the creditors of Jordan Valley Farms, to abrogate such compromise settlement in the entirety, to have the order dated July 14th, 1922, which was based thereon and consented to only upon the conditions of such compromise settlement

being adhered to by all parties, set aside, vacated, and nullified, and that a rehearing be held herein upon the petition of J. Humfeld, receiver, for allowance of Receiver's fees, attorneys' fees, and expenses, as well as the petition of T. H. Wegener, trustee in bankruptcy, for the delivery and transfer from the said J. Humfeld, Receiver, to said trustee in bankruptcy of all the assets and property belonging to the said bankrupt estate of Jordan Valley Farms.

That none of the creditors of Jordan Valley Farms, bankrupt, either separately or collectively, or otherwise, have ever approved the making of such compromise settlement by its attorney or the consent granted by its attorney to the entry of the order allowing the Receiver's fees and expenses herein, or any part thereof; and that the court in which said bankruptcy proceedings are pending, to wit, the District Court of the United States, for the District of Idaho, has never approved or ratified such compromise settlement in any respect. [101]

Wherefore, this deponent and petitioner respectfully requests the Court that the motion and petition of J. Humfeld, Receiver, for an order directing the Receiver to sell all the assets of the defendant corporations, now bankrupt, etc., be denied, and that the order dated July 14, 1922, granting and allowing such Receiver's fees and expenses be vacated, set aside and nullified.

LESLIE J. AKER.

(Duly verified.)

Filed October 30, 1922. G. H. Marsh, Clerk. [102]

AND AFTERWARDS, to wit, on the 30th day of October, 1922, there was duly filed in said court, a petition and affidavit of T. H. Wegener to set aside order allowing Receiver's fees, in words and figures as follows, to wit: [103]

(Title of Court and Cause.)

Affidavit and Petition of T. H. Wegener to Set Aside Order Allowing Receiver's Fees.

To the Honorable CHARLES E. WOLVERTON and ROBERT S. BEAN, Judges of the Above-entitled Court:

United States of America,
District and State of Idaho,
County of Ada,—ss.

I, T. H. Wegener, being first duly sworn, depose and say:

That I am the trustee in bankruptcy of the Estate of the Jordan Valley Farms, bankrupt, and as such official was present on July 14, 1922, in the courtroom in the Federal Building during the compromise negotiations leading to the consent of the attorneys for the bankrupt companies, Jordan Valley Farms and Jordan Valley Land & Water Company, to the making and entry of the order for allowance of Receiver's fees and expenses, under date of July 14, 1922, in the above-entitled matter; and that I fully heard and under-

stood the representations and statements made by counsel for the said J. Humfeld, Receiver, to wit, Judges Earl C. Bronaugh and Wallace McCammant and also by counsel for the Jordan Valley Irrigation District to wit, Judge William Morgan; that I have read the affidavit and petition verified herein on the 28th day of October, 1922, by Leslie J. Aker, attorney for the [104] said bankrupt estate, and believe that all the facts therein stated are true.

WHEREFORE, this deponent and petitioner respectfully requests the Court that the action and petition of J. Humfeld, Receiver, for an order directing the Receiver to sell all the assets of the defendant corporations, now bankrupt, etc., be denied, and that the order dated July 14th, 1922, granting and allowing such Receiver's fees and expenses be vacated, set aside, and nullified.

T. H. WEGENER.

(Duly verified.)

Filed October 30, 1922. G. H. Marsh, Clerk. [105]

AND AFTERWARDS, to wit, on Friday, the 3d day of November, 1922, the same being the 106th judicial day of the regular July term of court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding —the following proceedings were had in said cause, to wit: [106]

(Title of Court and Cause.)

Order on Petition of Mortgage Company for America for Order of Sale.

This matter regularly coming on for hearing upon the petition of the plaintiff above named, for an order authorizing J. Humfeld, Receiver, to sell the properties and assets of the defendant corporations in his custody as receiver, for the purpose of paying the allowances for the compensation and expenses of the Receiver and for the services of the Receiver's attorneys, as made by the order of this Court duly passed on the 14th day of July, 1922, and at the same time there comes on for hearing the petition of T. H. Wegener, trustee in bankruptcy of the estate of the defendant Jordan Valley Farms, for an order vacating and setting aside the said order of this Court passed July 14, 1922, and the Court having duly considered this matter;

IT IS NOW HERE ORDERED, ADJUDGED AND DECREED that the petition of the said T. H. Wegener be and the same is denied; and that the petition of the plaintiff be and the same is hereby allowed, and that the said Receiver proceed to sell at public auction to the highest bidder for cash, all of the properties and assets of the said defendants Jordan Valley Farms and Jordan Valley Land & Water Company, and particularly the irrigation system of the said Jordan Valley [107] Land & Water Company, known as the Jordan Valley Project, including all reservoirs, dams,

headgates, canals, ditches, flumes, gates, weirs, rights of way, lands, buildings and all other property of every kind and nature constituting a part of the said Jordan Valley Irrigation Project or to be used in connection therewith.

And it duly appearing to the Court from the petition of the plaintiff that the plaintiff, pursuant to said order of July 14, 1922, has paid to the Receiver, and the Receiver's attorneys, the allowances so made by said order of July 14, 1922, and by the terms of said order has become subrogated to the rights of the Receiver and his attorneys;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff may become a purchaser at the Receiver's sale of said assets, and that the proceeds of sale after payment of the expenses of making the sale be paid to the plaintiff to reimburse it for the payment made by it of the allowances made to the Receiver and his attorneys by the order aforesaid; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the receiver give notice of such sale by publication thereof once each week for four (4) successive weeks, in some weekly newspaper of general circulation in Malheur County, State of Oregon, and that said sale be made not less than thirty (30) days after the first publication of such notice of sale.

Dated Nov. 3d, 1922.

R. S. BEAN,
Judge.

Filed November 3, 1922. G. H. Marsh, Clerk
[108]

AND AFTERWARDS, to wit, on the 8th day of January, 1923, there was duly filed in said court a petition for appeal by E. M. Hoover, trustee in bankruptcy of the estate of Jordan Valley Land & Water Company, and by T. H. Wegener, trustee in bankruptcy of the estate of the Jordan Valley Farms, in words and figures as follows, to wit: [109]

(Title of Court and Cause.)

Petition for Appeal of E. M. Hoover and T. H. Wegener.

COME NOW E. M. Hoover, as trustee in bankruptcy of the estate of the Jordan Valley Land and Water Company, a bankrupt, and T. H. Wegener, as trustee in bankruptcy of the estate of the Jordan Valley Farms, a bankrupt, and, conceiving themselves aggrieved by the orders and decisions hereinafter described, to wit:

(a) That certain order made in the above-entitled cause on or about the 14th day of July, 1922, fixing and determining the compensation of J. Humfeld as Receiver in said cause and the compensation of his counsel, and approving and allowing the account of said J. Humfeld as such Receiver, and ordering and directing that the amount so fixed, determined and allowed as fees for said Receiver and his counsel and the amount of his disbursements as approved

and allowed by said [110] order should be a lien on the assets of the said defendants Jordan Valley Land and Water Company and Jordan Valley Farms, and ordering and directing that the said J. Humfeld as Receiver should retain possession of the property and assets of said bankrupts until the said charges, fees and allowances are paid, and providing further that upon payment of such fees, charges and allowances by the plaintiff the said plaintiff should be subrogated to the lien created or attempted to be created by said order of July 14, 1922;

(b) That certain order made on or about the 3d day of November, 1922, in the above-entitled cause, wherein and whereby it was ordered, adjudged and decreed that the said J. Humfeld as Receiver in said cause should proceed to notice for sale and sell all the assets of the said bankrupts for the payment of the fees, charges and allowances fixed, determined and allowed by the said order of July 14, 1922, hereinbefore referred to, and which said order of November 3, 1922, overruled and denied the petitions, applications and requests of your petitioners to vacate and set aside the said order of July 14, 1922, and to defer making any order in this cause authorizing or permitting a sale of the assets of said bankrupts by the said J. Humfeld, Receiver, or under or pursuant to the said order of July 14, 1922:

(c) The decision of this Court made on or about the 14th day of July, 1922, denying the petitions of your petitioners to require the said J. Humfeld as Receiver in said cause to turn over to your petition-

ers respectively all assets of whatsoever kind in his possession belonging to the estate of the said bankrupts, and in ordering and permitting the said Receiver to [111] retain possession of such assets, or any of them, until his fees and compensation as fixed and allowed by the said order of July 14, 1922, are paid and discharged;

Hereby appeal from said orders, decisions and decrees so made and entered as aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and your petitioners respectfully petition this Honorable Court to allow said appeal, and your petitioners further show:

1. That this cause was commenced on or about the 23d day of September, 1921, for the foreclosure by plaintiff of a lien in favor of said plaintiff upon certain securities pledged with plaintiff as collateral for an indebtedness from the said defendants to the said plaintiff, and that on or about the 29th day of September, 1921, upon plaintiff's application the said J. Humfeld was appointed Receiver of the said defendants in aid of said foreclosure, and as your petitioners are informed and believe, for the purpose of conserving and protecting the farm mortgages constituting the collateral above referred to by maintaining and operating the irrigation system through which water was delivered for the irrigation of the farms covered by such mortgages.

2. That on the 10th day of March, 1922, the defendant Jordan Valley Land and Water Company

was declared and adjudged a bankrupt by the District Court of the United States for the District of Idaho, Southern Division, under the Acts of Congress relating to bankruptcy, and thereafter and on or about the 17th day of April, 1922, your petitioner, E. M. Hoover, was duly appointed trustee in bankruptcy of the estate of said bankrupt, and thereafter and on the 18th day of April, 1922, the said [112] E. M. Hoover accepted said trust and executed and filed his bond in the sum of $5,000, which was duly approved on said 18th day of April, 1922, by the referee in bankruptcy for said District and Division, and said E. M. Hoover also filed his oath as such trustee.

3. That the said Jordan Valley Farms was on or about the 11th day of March, 1922, duly declared and adjudged a bankrupt by the District Court of the United States for the District of Idaho, Southern Division, underthe Acts of Congress relating to bankruptcy, and thereafter and on or about the —— day of April, 1922, your petitioner, T. H. Wegener was duly appointed trustee in bankruptcy of the estate of said Jordan Valley Farms, and he thereupon immediately qualified as such trustee by taking and filing his oath and executing the bond required, which was approved by the Referee in bankruptcy for said District and Division.

4. That thereafter and on or about the 20th day of April, 1922, a decree was made and entered in this cause in favor of the plaintiff and against the said defendants, which decree was entered after this Court had been advised of the fact that the said

defendants had been adjudged and declared bankrupts, as aforesaid by the District Court of the United States for the District of Idaho, Southern Division.

5. That thereafter your petitioners filed in this cause their petitions for delivery to them by the said J. Humfeld, Receiver, of all assets belonging to said bankrupts, respectively, except the mortgages held as collateral by plaintiff, which mortgages are particularly described in the decree so made and entered as aforesaid. [113]

6. That on the 14th day of July, 1922, there came on for hearing before this Honorable Court in this cause the application of said J. Humfeld for the allowance of his fees and compensation as such Receiver and for the approval of his account as such Receiver, and for the allowance of the fees of his counsel and attorneys, and also the petitions of your petitioners for the delivery to them of the possession of the property and assets of said bankrupts in the possession of said Receiver; that at the time of said hearing or immediately prior thereto the said plaintiff and the said J. Humfeld as Receiver and their solicitors in this cause entered into an agreement with the Jordan Valley Irrigation District wherein and whereby said District agreed to pay an amount agreed upon as fees and compensation for the Receiver and his counsel and the amount claimed by plaintiff as due from said defendants under the decree above referred to, and it was agreed that upon payment of said sums the said Receiver would surrender posses-

sion to your petitioners of the assets claimed by your petitioners as trustees in bankruptcy, and upon the assurance that such sums would be paid by said Jordan Valley Irrigation District and such agreement carried out in good faith, counsel for your petitioners consented, but without authority from or knowledge thereof by the creditors represented by your petitioners, to the allowance of said fees and compensation of the Receiver and his counsel, and to the approval of the account of said Receiver, all of which is more particularly set forth in the affidavits of your petitioners and J. H. Richards and Leslie J. Aker filed herein on or about the 30th day of October, 1922. [114]

7. That for the reasons set forth in the said affidavits above referred to the said Jordan Valley Irrigation District has not paid the said sums so allowed said Receiver and his counsel, and thereafter and on or about the 3d day of November, this Court entered an order herein authorizing and directing the said Receiver to sell all assets whether in his possession or not belonging to said bankrupts or to your petitioners as trustees of the estates of said bankrupts for the purpose of paying the fees and allowances approved and allowed under the said order of July 14, 1922, notwithstanding your petitioners protested that the making of such order would be a fraud upon the creditors of said bankrupts represented by your petitioners, and the said J. Humfeld, Receiver, is now advertising all the assets of said bankrupts for sale pursuant to said order of November 3, 1922, at 10 A. M. on the

10th day of January, 1922, at the front door of the courthouse of Malheur County, Oregon, at Vale in said county and state, including over 2,000 acres of land and other assets having no relation to the irrigation system which said Receiver was appointed to maintain and operate during the pendency of this cause, which sale is made in violation of the agreement upon which the order of July 14, 1922, was based and in violation of the terms upon which counsel for your petitioners consented to the allowance of the fees claimed by said Receiver and his counsel and the allowance of the disbursements claimed to have been made by said Receiver.

8. That on the 27th day of November, 1922, at a meeting of the creditors of the said Jordan Valley Land and Water Company duly called by the Referee in Bankruptcy it was unanimously ordered that the pretended stipulation referred to in the said order of July 14, 1922, as being made on behalf of [115] E. M. Hoover, as Trustee in Bankruptcy of said bankrupt, be annulled, repudiated, canceled and set aside, and as having been entered into without the consent, knowledge, approval or direction of said trustee and of said creditors; and it was further ordered and directed an appeal be taken in this cause from the orders and decisions hereinbefore referred to, and on the 2d day of January, 1923, at a meeting of the creditors of the said Jordan Valley Farms duly called by the Referee in Bankruptcy it was ordered that an appeal be likewise

taken by the Trustee in Bankruptcy of the said Jordan Valley Farms.

9. That if said sale is permitted to be made your petitioners will be remediless in the premises for all assets belonging to said bankrupts are being advertised for sale by said J. Humfeld, Receiver, and your petitioners have no funds with which to protect their interest in said property, and the said J. Humfeld and one J. L. McAllister, Assistant Secretary of the Desert Land Board of the State of Oregon, and the said Jordan Valley Irrigation District are confederating and conspiring together to sell the said assets at a nominal sum to said Jordan Valley Irrigation District, and upon such sale having been made and confirmed, the said District will pay to said plaintiff, or to said J. Humfeld, the amount agreed upon immediately prior to the making of said order of July 14, 1922, and this course and procedure is being taken by the said Receiver and by the said District and by the said J. L. McAllister for the purpose of defeating the creditors of the said bankrupts represented by your petitioners and so that said Jordan Valley Irrigation District may acquire title to said irrigation system for less than its real value and for less than it would have to pay therefor if said Receiver's sale were not held, all of which more fully appears from the affidavits filed as aforesaid [116] on October 30, 1922; that the said J. L. McAllister is Assistant Secretary of the Desert Land Board of the State of Oregon and as such pretends to be directing and advising the said Jordan Valley Irrigation District

relative to the purchase of said irrigation system and the issuance of bonds by said District for the payment of the purchase price.

WHEREFORE, your petitioners pray that this appeal may be allowed from the said decisions, orders and decrees, and that citation issue as provided by law, and for supersedeas pending such appeal, and your petitioners tender bond in such amount as the Court may require for such purpose, and for such other relief as may be meet and proper under the circumstances.

E. M. HOOVER,
As Trustee of Jordan Valley Land and Water Co., a Bankrupt.

By RICHARDS & HAGA and
CHARLES E. WINSTEAD,
His Solicitors,
Residence, Boise, Idaho.

T. H. WEGENER,
As Trustee in Bankruptcy of Jordan Valley Farms, Bankrupt.

By LESLIE J. AKER and
BARGE E. LEONARD,
His Solicitors,
Residence, Boise, Idaho.

Filed January 8, 1923. G. H. Marsh, Clerk.
[117]

AND AFTERWARDS, to wit, on the 8th day of January, 1923, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [118]

(Title of Court and Cause.)

Assignment of Errors.

COME NOW E. M. Hoover, Trustee in Bankruptcy of the estate of Jordan Valley Land & Water Company, a bankrupt, and T. H. Wegener, Trustee in Bankruptcy of Jordan Valley Farms, a bankrupt, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the orders, decisions and decrees made and entered on or about the 14th day of July, 1922, and on or about the 3d day of November, 1922, say that said orders, decisions and decrees are erroneous and unjust to your petitioners as Trustees in bankruptcy of the estates of said defendants, and particularly in this:

1. Because the Court erred in ordering, directing and providing in the said order of July 14, 1922, that the said plaintiff or J. Humfeld as Receiver for said defendants in aid of plaintiff's foreclosure shall retain possession of all assets belonging to the estates of said bankrupts until his fees and compensation and the fees of his counsel and allowances made on account of disbursements have been fully paid and satisfied. [119]

2. Because the Court erred in holding and deciding in said order of July 14, 1922, that plaintiff

or J. Humfeld as Receiver in said cause, had a lien upon all assets of the said bankrupts prior and superior to the claim or title of your petitioners as trustees in bankruptcy of the estates of said bankrupts, and that said Receiver or the said plaintiff could hold and retain all of such assets until said lien had been paid or discharged.

3. Because the Court erred in making any allowance for fees or compensation to said Receiver or to his counsel, and in approving the claims and accounts of said Receiver without hearing any evidence and without any information as to the reasonableness thereof, or the value of the services of either the said Receiver or his counsel, or as to the correctness of said accounts.

4. Because said order is based in part if not entirely upon an assumed consent or stipulation of counsel for your petitioners, who were without authority to make any agreement, stipulation or consent that would bind the creditors of the said Jordan Valley Land & Water Company and the said Jordan Valley Farms, represented by your petitioners as Trustees in Bankruptcy of the estates of said bankrupts.

5. Because the Court erred in not granting the petition of your petitioners praying and petitioning that the said J. Humfeld as Receiver in said cause, be required to turn over and deliver to your petitioners all the assets in his possession as such Receiver, or otherwise, belonging to the said Bankrupts.

6. Because the Court erred in making and entering the order dated on or about the 3d day of November, 1922, directing or authorizing the said J. Humfeld as Receiver, to sell all the assets of the said Bankrupts to satisfy his alleged lien for the [120] amount claimed to be due him under the said order of July 14, 1922, for his alleged services and for the services of his counsel and on account of alleged disbursements.

7. Because the Court erred in holding and deciding that the showing made and proof submitted on or about the 30th day of October, 1922, in this cause, against the making of the order dated November 3, 1922, was insufficient and inadequate to prevent the sale of the said property to satisfy said alleged lien in favor of said Receiver.

8. Because the Court erred in not vacating and setting aside the said order of July 14, 1922, in view of the showing made and proof submitted at the hearing held on or about the 30th day of October, 1922, in said cause.

9. Because the Court erred in not holding and deciding that your petitioners and their counsel and solicitors were without power or authority under the Bankruptcy Act without first having obtained the approval of the creditors of said bankrupts and their consent thereto, to enter into any agreement such as is referred to in the said order of July 14, 1922.

10. Because the Court erred in making the order of July 14, 1922, fixing the compensation of the Receiver and his counsel and allowing and approv-

ing the accounts of said Receiver, without any proof or evidence either as to the extent or nature of the services rendered by said Receiver and his counsel or the reasonable value thereof, or as to the correctness of said accounts or as to whether such accounts were rendered in connection with a proper discharge of the duties of such Receiver, but said order was apparently entered and based upon the consent of counsel for the trustees in bankruptcy, which in turn was based upon an agreement between the Receiver and said plaintiff and the Jordan Valley Irrigation District that the latter would pay all such charge [121] and expenses, and that the same would not become a claim or charge against the estate of said bankrupts; that said plaintiff and the receiver and the said Jordan Valley Irrigation District are now conspiring and confederating together not to carry out said agreement but to defraud the creditors of said bankrupts by selling all the assets of whatsoever kind and nature of said bankrupts to pay the amounts so fixed and allowed by the said order of July 14, 1922, which said claims have never been approved by the bankruptcy court or the creditors of said bankrupts or the referee in bankruptcy, but have been expressly repudiated by said creditors and referee in bankruptcy since the making of the order of November 3, 1922.

11. That the amount allowed by said order of July 14, 1922, to said Receiver and his counsel and the allowances made the Receiver on account of disbursements are excessive and exorbitant and are

grossly in excess of the reasonable value of the services rendered by the Receiver and his counsel, and the disbursements of the Receiver allowed by said order are excessive and exorbitant and were not incurred in the reasonable discharge of the duties of said Receiver.

WHEREFORE These petitioners and appellants pray that the order dated on or about July 14, 1922, be annulled and set aside, and that the order dated on or about the 3d day of November, 1922, be annulled and set aside, and that the District Court be directed to grant the petitions of your petitioners praying that the said J. Humfeld, Receiver in said cause, be ordered and directed to turn over and deliver to your petitioners all the assets in his possession belonging to the estates of the said Bankrupts.

RICHARDS & HAGA,
CHARLES E. WINSTEAD,

Solicitors for E. M. Hoover, as Trustee in Bankruptcy of Jordan Valley Land & Water Co., a Bankrupt.

LESLIE J. AKER,
BARGE E. LEONARD,

Solicitors for T. H. Wegener, Trustee in Bankruptcy of Jordan Valley Farms, a Bankrupt.

Filed January 8, 1923. G. H. Marsh, Clerk. [122]

AND AFTERWARDS, to wit, on the 8th day of January, 1923, there was duly filed in said court an order by the United States Circuit Judge for the Ninth Circuit allowing appeal, in words and figures as follows, to wit: [123]

(Title of Court and Cause.)

Order Allowing Appeal.

And now, to wit, on this 8th day of January, 1923, it is ordered that the petition for appeal in the above-entitled cause by the trustees in bankruptcy of the defendants above named be granted, and that the appeal be allowed as prayed for in the petition for appeal, such appeal to operate as a supersedeas upon the petitioners' filing a bond in the sum of $1000.00 with sufficient sureties conditioned as required by law.

WM. B. GILBERT,
Circuit Judge.

Filed January 8, 1923. G. H. Marsh, Clerk. [124]

AND AFTERWARDS, to wit, on the 8th day of January, 1923, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [125]

(Title of Court and Cause.)

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, E. M. Hoover as trustee of the estate of

Jordan Valley Land and Water Company a bankrupt, and T. H. Wegener, as trustee of the estate of Jordan Valley Farms, a bankrupt, as principals, and the American Surety Company of New York, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the plaintiff above-named in the just and full sum of one thousand ($1,000.00) dollars for the payment of which well and truly to be made we bind ourselves and each of us, and our and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 8th day of January in the year of our Lord one thousand nine hundred twenty-three.

The condition of this obligation is such that, whereas, the above-named E. M. Hoover, trustee of the estate of the Jordan Valley Land and Water Company, a bankrupt, and T. H. Wegener, as trustee of the estate of the Jordan Valley Farms, a bankrupt, the said principals, have prosecuted an appeal [126] to the United States Circuit Court of Appeals for the Ninth Circuit from certain orders made and entered in said cause on or about the 14th day of July, 1922, and the 3d day of November, 1922, in the United States District Court for the District of Oregon, as more fully appears from the petition for an appeal in said cause, and from the assignment of errors filed in connection with said petition;

NOW, THEREFORE, if the above-named principals E. M. Hoover, trustee of the estate of the

Jordan Valley Land and Water Company, a bankrupt, and the said T. H. Wegener, as trustee of the estate of Jordan Valley Farms, a bankrupt, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principals have hereunto set their hands and seals and the said surety has caused its name to be hereunto subscribed by its duly authorized officers, and its corporate seal affixed, the day and year first above written.

E. M. HOOVER,

As Trustee of the Estate of Jordan Valley Land and Water Company, a Bankrupt.

T. H. WEGENER,

As Trustee of the Estate of Jordan Valley Farms, a Bankrupt.

AMERICAN SURETY COMPANY OF NEW YORK.

By W. A. KING,

Resident Vice-President.

W. A. KING, Agent.

[Seal of American Surety Co.]

Attest: E. LIEMAN,

Resident Asst. Secretary. [127]

The foregoing bond is hereby approved to operate as a supersedeas and all proceedings in said cause under the orders appealed from, or either of them,

by plaintiff, or by J. Humfield, Receiver, are hereby stayed until the further order of the court.

Dated this eighth day of January, 1923.

WM. B. GILBERT,
Circuit Judge.

Service of a copy of the foregoing bond and order is hereby accepted and admitted this 8th day of January, 1923, at Portland, Oregon.

BRONAUGH & BRONAUGH,
Of Attorneys for Mortgage Company for America, Plaintiff.

Filed January 8, 1923. G. H. Marsh, Clerk. [128]

AND AFTERWARDS, to wit, on the 8th day of January, 1923, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [129]

(Title of Court and Cause.)

Praecipe for Transcript on Appeal.

To G. H. Marsh, Clerk of the Above-entitled Court:

You will please prepare the record on the appeal of E. M. Hoover as trustee of the Jordan Valley Land and Water Company, a bankrupt, and T. H. Wegener as trustee of the Jordan Valley Farms, a bankrupt, taken in the above-entitled cause from the orders made and entered therein on or about the 14th day of July, 1922, and the 3d day of November, 1922, such record to consist of the following pleadings, excerpts from pleadings, documents and papers:

1. Paragraphs I to XI, inclusive of the bill of complaint, and the first general paragraph of paragraph XII ending with the word "to-wit," but in lieu of subparagraphs 1 to 19, inclusive, insert the following: "(Here follows a detailed description of notes secured by mortgages on lands in Malheur County, Oregon, and certificates of stock in Jordan Valley Water Company for water appurtenant to the land described in said mortgages, the aggregate principal value of such notes being approximately $59,997, all bearing interest at the rate of 6% per annum until maturity and 8% after maturity, interest [130] payable annually, and the principal payable in installments extending over a series of years)"; include paragraph XIII, but omit paragraph XIV, include paragraphs XV, XVI and XVIII, also all of the second cause of action except subparagraphs 1 to 16, inclusive, of paragraph VIII, and in lieu of subparagraphs 1 to 16 insert the following: "Here follows a detailed description of notes secured by mortgages on lands in Malheur County, Oregon, and certificates of stock in Jordan Valley Water Company for water appurtenant to the land described in said mortgages, the aggregate principal value of such notes being approximately $85,233.78, all bearing interest at the rate of 6% per annum until maturity and 8% after maturity, interest payable annually, and the principal payable in installments extending over a series of years."

2. Include order dated September 29, 1921, appointing Receiver.

3. Omit answer of Jordan Valley Land and Water Company, but in lieu thereof insert "Answer of Jordan Valley Land and Water Company filed ——." (Insert date of filing.)

4. Omit answer of Jordan Valley Farms, but in lieu thereof insert "Answer of Jordan Valley Farms filed ——." (Insert date of filing.)

5. Include decision of Court after final hearing.

6. Include decree, but omit subparagraphs 1 to 19, inclusive, of paragraph 1 and in lieu thereof insert "Description of mortgages omitted in accordance with the Praecipe"; also omit subparagraphs 1 to 16, inclusive, of paragraph second, and in lieu thereof insert "Description of mortgages omitted in accordance with Praecipe." [131]

7. Include petition of E. M. Hoover, Trustee in Bankruptcy, for delivery to him by the Receiver of the Jordan Valley Land and Water Company of certain property.

8. Include answer of J. Humfeld, Receiver, to petition of E. M. Hoover, Trustee.

9. Include petition of T. H. Wegener as trustee for delivery to him of property in possession of J. Humfeld, Receiver.

10. Include answer of J. Humfeld to such petition.

11. Include petition of J. Humfeld filed on or about June 27, 1922, for the approval of his account and the allowance of fees for himself and his counsel.

12. Include answers of E. M. Hoover, Trustee,

and of T. H. Wegener, Trustee, to petition of J. Humfeld.

13. Include order made on or about July 14, 1922, on petition of J. Humfeld, Receiver.

14. Include petition of J. Humfeld, Receiver, filed on or about the 18th day of October, 1922, for permission to make sale under order dated July 14, 1922.

15. Include affidavits of E. M. Hoover, J. H. Richards, Leslie J. Aker, and petition and affidavit of T. H. Wegener, filed on or about October 30, 1922.

16. Include order dated November, 3. 1922.

17. All papers filed in connection with this appeal, viz.: Petition for appeal, assignment of errors, order allowing appeal, bond on appeal, citation, and this praecipe.

In preparing the above record you will please omit the title of all pleadings except on the bill of complaint, but in lieu thereof insert the words "Title of Court and Cause," to be followed by the name of the pleading or instrument. You will [132] also please omit the verification of all pleadings, but in lieu thereof insert, whenever the pleading is verified, the words "Duly verified."

Dated this 8th day of January, 1923.

RICHARDS & HAGA,
CHARLES E. WINSTEAD,
Solicitors for E. M. Hoover, Trustee.
LESLIE J. AKER,
BARGE E. LEONARD,
Solicitors for T. H. Wegener, Trustee.

Filed January 8, 1923. G. H. Marsh, Clerk.
[133]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 4 to 133, inclusive, constitute the transcript of record on appeal in the case in said court in which the Mortgage Company for America is plaintiff and appellee and the Jordan Valley Farms and Jordan Valley Land and Water Company are defendants and E. M. Hoover, Trustee in Bankruptcy of the Estate of the Jordan Valley Land and Water Company, a Bankrupt, and T. H. Wegener, Trustee in Bankruptcy of the Estate of Jordan Valley Farms, a Bankrupt, are appellants. That the said transcript of record has been prepared by me in accordance with the praecipe for transcript filed by the said appellants, and that I have omitted from the said transcript those portions of the record designated by the said praecipe to be omitted and inserted in lieu thereof the statement designated in said praecipe. That the said transcript is a full, true, and correct transcript, in accordance with the directions of said praecipe, of the record and proceedings had in said court and

cause as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $34.40, and has been paid by the said appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of said court to be affixed, at Portland, in said district, this 24th day of February, 1923.

[Seal] G. H. MARSH,
Clerk. [134]

[Endorsed]: No. 3987. United States Circuit Court of Appeals for the Ninth Circuit. E. M. Hoover, Trustee in Bankruptcy of the Estate of the Jordan Valley Land and Water Company, a Bankrupt, and T. H. Wegener, Trustee in Bankruptcy of the Estate of the Jordan Valley Farms, a Bankrupt, Appellants, vs. The Mortgage Company for America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed February 26, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

February 2, 1923.

MORTGAGE COMPANY FOR AMERICA

vs.

JORDAN VALLEY FARMS and JORDAN VALLEY LAND AND WATER COMPANY.

Order Extending Time to and Including March 1, 1923, to File Record and Docket Cause.

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is extended to and including March 1, 1923.

R. S. BEAN,
Judge.

[Endorsed]: No. 3987. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including March, 1, 1923, to File Record and Docket Cause. Filed Feb. 26, 1923. F. D. Monckton, Clerk.

No. 3987

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. M. HOOVER, as Trustee of the Jordan Valley Land & Water Company, a bankrupt, and T. H. WEGENER, as Trustee of the Jordan Valley Farms, a bankrupt, *Appellants,*

vs.

MORTGAGE COMPANY FOR AMERICA, *Appellee.*

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

RICHARDS & HAGA
and
C. E. WINSTEAD,
Solicitors for E. M. Hoover, Trustee, etc.,
Residence: Boise, Idaho.

LESLIE J. AKER,
Solicitor for T. H. Wegener, Trustee, etc.,
Residence: Boise, Idaho.

Filed..... 192.....

..... Clerk

No. 3987

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. M. HOOVER, as Trustee of the Jordan Valley Land & Water Company, a bankrupt, and T. H. WEGENER, as Trustee of the Jordan Valley Farms, a bankrupt, *Appellants,*

vs.

MORTGAGE COMPANY FOR AMERICA, *Appellee.*

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

RICHARDS & HAGA
and
C. E. WINSTEAD,
Solicitors for E. M. Hoover, Trustee, etc.,
Residence: Boise, Idaho.

LESLIE J. AKER,
Solicitor for T. H. Wegener, Trustee, etc.,
Residence: Boise, Idaho.

Filed..... 192.....

..... Clerk

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

E. M. HOOVER, as Trustee of the Jordan Valley Land & Water Company, a bankrupt, and T. H. WEGENER, as Trustee of the Jordan Valley Farms, a bankrupt, *Appellants,*

VS.

MORTGAGE COMPANY FOR AMERICA, *Appellee.*

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE

This appeal is from an order made on July 14, 1922, and an order made on November 3, 1922, by the District Court, by the first of which the Court fixed the compensation of J. Humfield, Receiver, and of his counsel, and approved certain disbursements of the Receiver and directed that the amount so due for services and disbursements should be a lien upon the property of the bankrupts and that possession thereof should not be turned over to the Trustees in bankruptcy until the amount so found due the Receiver

and his counsel had been paid. By the second order—dated November 3, 1922—the Court directed the Receiver to sell the property of the bankrupts upon which it had impressed a lien by the order of July 14th. There is no controversy over the facts.

The Jordan Valley Land & Water Company, a Nevada corporation, was adjudged a bankrupt on March 10, 1922, and the Jordan Valley Farms, an Idaho corporation, was adjudged a bankrupt on March 11, 1922, by the United States District Court for the District of Idaho on the petition of unsecured creditors of the two corporations. At the time the corporations were adjudged bankrupts, certain property belonging to them was held by one J. Humfield, General Managing Agent of Appellee, as Receiver appointed in a suit to foreclose a pledge, pending in the District Court for the District of Oregon, wherein the Mortgage Company for America was plaintiff and the Jordan Valley Companies were defendants, but such foreclosure suit or pledge did not include the property in the possession of the Receiver and upon which the lien was impressed by the order of July 14th.

The facts stated chronologically and more in detail are substantially as follows:

The Jordan Valley Land & Water Company was engaged in the construction of an irrigation system in Malheur County, Oregon, and in connection with the sale of water rights in such irrigation system it took in part payment therefor notes from land owners, secured by mortgages on the lands to be irrigated from such irrigation system. The Jordan Valley Farms was

associated in the enterprise. In 1919 and 1920 the Jordan Valley Companies borrowed from the Mortgage Company for America approximately $82,000, giving their joint and several promissory notes therefor, and as security for the payment of these notes they pledged as collateral a number of notes of land owners under the irrigation system of the Jordan Valley Land & Water Company, which collateral notes were in turn secured by farm mortgages. The aggregate amount of the notes and mortgages so pledged with the Mortgage Company for America as security for the notes of the Jordan Valley Companies was considerably in excess of the amount borrowed from Appellee. (Rec. pp 11 & 20)

In September, 1921, Appellee brought suit to foreclose its pledge and in the Bill of Complaint it alleged in substance that the security (farm mortgages) which it held would be depreciated and impaired unless a receiver was appointed to operate the irrigation system so that water could be delivered to the lands embraced in such farm mortgages. Appellee claimed no lien upon the irrigation system, but it demanded the appointment of a receiver for the protection of its collateral security.

The Court accordingly appointed, on September 29, 1921, J. Humfield, general managing agent of Appellee, Receiver of the irrigation system. While the order appointing the receiver is somewhat broader than the allegations and prayer of the complaint, the Receiver is nevertheless a Receiver *pendente lite* for the purpose of protecting a secured creditor and the estate upon which it was foreclosing, viz: The mortgages given by the farmers and pledged with Appellee.

On March 10th and 11th, the Jordan Valley Land & Water Company and the Jordan Valley Farms were respectively declare bankrupts by the District Court for Idaho on the petition of unsecured creditors, and E. M. Hoover was elected trustee by the creditors of the Jordan Valley Land & Water Company, and T. H. Wegener was elected trustee by the creditors of the Jordan Valley Farms.

Thereafter, and on April 20th, the District Court for Oregon entered its decree in the foreclosure suit brought by Appellee. The decree makes no reference to the Receiver which had been appointed on September 29, 1921, but it finds the amount due Appellee under the several notes of the Jordan Valley Companies and directs the sale of the collateral unless the amount due is paid within ten days. The decree also directs that the proceeds from the sale of the collateral securities pledged with Appellee shall be applied "first, to the payment of the expenses, costs and disbursements of this proceeding and said solicitor's fees, and next to the payment of the amounts decreed due upon the promissory notes described in plaintiff's first cause of suit" (Rec., p. 34).

The Master in Chancery was directed to sell the collateral and carry out the terms of the decree.

The Trustees in Bankruptcy in due course made application to the District Court of Oregon to direct the Receiver to deliver to the Trustees respectively such of the properties of the bankrupt as were in his possession.

On July 14, 1922, these applications, together with the application of the Receiver, J. Humfield, for the

approval of his accounts and for fixing the compensation of himself and his counsel came on for hearing. The Trustees filed answer to the petition of the Receiver and denied the liability of the estate of the bankrupts for such charges on the ground, among others, that such Receiver was acting solely in the interest of the plaintiff (Appellee) in the foreclosure suit, and not for the benefit of general creditors. It appears from the record (Rec., pp. 82-100), that the Jordan Valley Irrigation District had been organized to acquire the water right mortgages and the irrigation system, and that immediately prior to the hearing in Court on July 14th the representatives of the District agreed to pay as part of the purchase price of the water right mortgages which Appellee had purchased at the Master's Sale the amount claimed by J. Humfield as Receiver, and in view of this mutual agreement between the Receiver and the Irrigation District, counsel for the Trustees in bankruptcy, made no contest before the Court on the petition of the Receiver and no evidence was introduced upon the hearing, but the order of July 14th was made upon the consent of counsel but without any authority so to do from either the creditors or the Bankruptcy Court. What followed is set out in the affidavits of the Trustees and counsel who participate and submitted in opposition to the petition of Appellee to sell the assets held by the Receiver and not included in the pledge. It should be stated that Appellee claimed it had paid the allowances made to the Receiver and his counsel and that it was accordingly subrogated to the Receiver's lien.

Whether the Irrigation District failed to pay the amount allowed by the order of July 14th because of a collusive agreement with the Receiver or Appellee, or for some other reason, must perhaps be determined from the showing made by the Appellants on the hearing of the petition to sell, if it becomes important in the determination of this appeal. However, neither the creditors nor the bankruptcy Court or Referee ever approved the pretended compromise on which the order of July 14th rests. But the District Court for Oregon on November 3rd, 1922, made an order in the foreclosure suit directing the sale of the properties of which the Receiver had taken possession, although not included in Appellee's lien.

From the orders referred to, Appellants have appealed to this Court, claiming in substance that they are entitled to the possession of the property under the Bankruptcy Law free of the lien attempted to be created against the same in favor of the Receiver.

SPECIFICATION OF ERRORS

The errors relied on are set forth in considerable detail in the Assignment of Errors, pages 113 to 117 of the record on appeal. Stated generally they are:

1. That the Court was without jurisdiction, power, or authority to appoint a Receiver in said cause over property not included in the security held by Appellee.

2. Because the Court erred in ordering, directing or providing in the said order of July 14th, 1922, that the said Appellee or J. Humfield as Receiver should retain possession of all assets belonging to the

estates of said bankrupts until the allowances made on account of fees and disbursements had been fully paid and satisfied.

3. Because the Court erred in making any allowance for fees or compensation to said Receiver or to his counsel, and in approving the claims and accounts of said Receiver without hearing any evidence and without any information as to the reasonableness thereof, or the value of the services of either the said Receiver or his counsel, or as to the correctness of said accounts.

4. Because said order is based in part if not entirely upon an assumed consent or stipulation of counsel for appellants, who were without authority to make any agreement, stipulation or consent that would bind the creditors of the said Jordan Valley Land & Water Company and the said Jordan Valley Farms, represented by the Trustees in Bankruptcy.

5. Because the Court erred in not granting the petition of Appellants praying and petitioning that the said J. Humfield as Receiver in said case be required to turn over and deliver to them all the assets in his possession as such Receiver, or otherwise, belonging to the said bankrupts.

6. Because the Court erred in making and entering the order dated on or about the 3rd day of November, 1922, directing or authorizing the said J. Humfield as receiver to sell all the assets of the said Bankrupts to satisfy his alleged lien for the amount claimed to be due him under the said order of July 14th, 1922, for his alleged services and for the services of his counsel and on account of alleged disbursements.

7. Because the Court erred in holding and deciding that the showing made and proof submitted on or about the 30th day of October, 1922, in this cause, against the making of the order dated November 3rd, 1922, was insufficient and inadequate to prevent the sale of the said property to satisfy said alleged lien in favor of said Receiver.

8. Because the Court erred in not vacating and setting aside the said order of July 14th, 1922, in view of the showing made and proof submitted at the hearing held on or about the 30th day of October, 1922, in said cause.

9. Because the Court erred in not holding and deciding that your petitioners and their counsel and solicitors were without power or authority under the Bankruptcy Act without first having obtained the approval of the creditors of said Bankrupts and their consent thereto, to enter into any agreement such as is referred to in the said order of July 14th, 1922.

10. Because the Court erred in making the order of July 14th, 1922, fixing the compensation of the Receiver and his counsel and allowing and approving the accounts of said Receiver, without any proof or evidence either as to the extent or nature of the services rendered by said Receiver and h's counsel or the reasonable value thereof, or as to the correctness of said accounts or as to whether such accounts were rendered in connection with a proper discharge of the duties of such Receiver, but said order was apparently entered and based upon the consent of counsel for the trustees in bankruptcy, which in turn was based upon an agree-

ment between the Receiver and said plaintiff and the Jordan Valley Irrigation District that the latter would pay all such charges and expenses, and that the same would not become a claim or charge against the estate of said bankrupts; that said Appellee and the Receiver and the said Jordan Valley Irrigation District are now conspiring and confederating together not to carry out said agreement, but to defraud the creditors of said bankrupts by selling all the assets of whatsoever kind and nature of said bankrupts to pay the amounts so fixed and allowed by the said order of July 14th, 1922, which said claims have never been approved by the Bankruptcy Court or the creditors of said bankrupts or the referee in bankruptcy, but have been expressly repudiated by said creditors and referee in bankruptcy since the making of the order of November 3, 1922.

11. That the amount allowed by said order of July 14th, 1922, to said Receiver and his counsel and the allowances made the Receiver on account of disbursements are excessive and exorbitant and are grossly in excess of the reasonable value of the services rendered by the Receiver and his counsel, and the disbursements of the Receiver allowed by said order are excessive and exorbitant and were not incurred in the reasonable discharge of the duties of said Receiver.

BRIEF OF THE ARGUMENT

The Court was without jurisdiction to appoint Receiver for property not covered by the lien which Appellee was seeking to foreclose.

An Alien cannot maintain a suit in the Federal Court for Oregon against two defendants, one of which is a citizen and inhabitants of Nevada and the other a citizen and inhabitant of Idaho.

Sec. 2, Article III, U. S. Constitution.
The Judicial Code, Sec. 24.
In re Hohorst, 150 U. S. 654, 37 L. Ed. 1211.
Galveston & C. Co. vs. Gonzales, 151 U. S. 496 38 L. Ed. 248.

The Court was without jurisdiction to appoint a receiver to take charge of property which was not involved in the litigation and upon which Appellee claimed no lien.

Thomas vs. Armstrong (Okla.), 151 Pac. 689, L. R. A. 1916B ,1182.
Smith vs. McCullough, 104 U. S. 25, 26 L. Ed. 637.
Wormser vs. Merchants' Nat. Bank, 49 Ark. 117, 4 S. W. 198.
Staples vs. May, 87 Cal. 178.
Bowman vs. Hazen, 69 Kan. 682, 77 Pac. 589.

"When a bill is filed to foreclose a mortgage, the Court may, upon a proper showing, appoint a receiver to take into his possession and control the mortgaged property. But the jurisdiction possessed by a Court of Chancery to foreclose a mortgage and appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody

or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the Court in such a suit rightfully make any order that will prevent, hinder or delay the other creditors of the mortgagor from subjecting property not included in the mortgage to the payment of their debts."

Scott vs. Trust Co., 16 C. C. A. 358, 69 Fed. 17.
Central Trust Co. vs. Worcester Etc. Co., 114 Fed. 659.
Tyler vs. Hamilton, 62 Fed. 187.

The orders of the Court appointing a receiver and stating his duties and powers should have due regard to the purpose of a receiver in a foreclosure action, namely, to protect the right of the mortgagee, to obtain payment of his debt from the *mortgaged property*, and they should not extend beyond the lien of the mortgage so as to embarrass other creditors in the collection of their claims.

Wormser vs. Merchants Nat. Bank, 49 Ark. 117, 4 S. W. 198.
1 Tardy's Smith on Receivers, p. 586.

H. Humfeld, General Managing Agent of plaintiff in foreclosure suit, was appointed receiver in aid of plaintiff and for the protection of the property covered by the mortgage. He cannot urge that he was acting for other creditors, secured or unsecured. Manifestly, his relation to plaintiff would have disqualified him as a general receiver.

Plaintiff (Appellee) was foreclosing only upon a pledge of choses in action which were in its possession and in such cases there is no occasion for a receiver, unless it be to collect the securities pending the litigation, and that plaintiff had the right to do as pledgee and assignee of the securities.

It was the duty of the Receiver to deliver to the trustees in bankruptcy all property in his possession not covered by plaintiff's lien.

If the suit is a foreclosure suit or other suit in equity not creating a lien, but simply enforcing it, and the receiver therein does more than simply conserve the assets subject to the lien and seizes other assets, although doing so by authority of the state law, the possession of the State Court will be protected as to the assets covered by the lien, but will be superseded as to the remainder.

2 Remington on Bankruptcy, Sec. 1587.

A receiver or trustee, when appointed in the bankruptcy proceeding, while not entitled to the mortgaged property, will be entitled to any excess arising from the foreclosure sale when made by order of the State Court after payment of the mortgage and costs of foreclosure.

The jurisdiction of the Courts of Bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive and receivers appointed by other Courts should immediately turn over the property to the trustee in bankruptcy.

1 Clark on Receivers, p. 443.
In re Watts, 190 U. S. 1, 47 L. Ed. 933.

In re Diamond's Est., 259 Fed. 70.
Hume vs. Myers, 242 Fed. 827.

The operation of the bankruptcy laws cannot be defeated or embarrassed by special receivers appointed in aid of secured creditors.

The District Court for Oregon could not impress a lien on the unincumbered assets of the bankrupts for the payment of the costs and fees of a receiver appointed in aid of a secured creditor having a lien on other assets for the protection of which the receiver was appointed.

> "When a Court of Equity appoints receivers of corporate property, its allowance to its receiver and their attorney is an administrative order, presumptively right as to the justice of the allowance. When the property falls by operation of law into the Bankruptcy Court, that Court by comity will indulge the presumption in favor of the correctness of the allowance, but the Court of Bankruptcy, having the responsibility of administration, must exercise its independent judgment, giving due weight to the presumption in favor of the administrative finding of the Court of Equity."

Hume vs. Myers (C. C. A., 4th Cir.), 242 Fed. 827, 830.

In re Diamond's Estate (C. C. A., 6th Cir.), 259 Fed. 70.

In re Watts, 190 U. S. 1.

In re Neuberger (C. C. A., 2nd Cir.), 240 Fed. 947.

Hanson vs. Stephens, 116 Ga. 722.

2 Remington on Bankruptcy, 1513.

A mortgagee who obtains the appointment of a receiver in aid of its foreclosure proceedings and for the protection of the assets covered by its lien, is not entitled to a prior lien upon the unincumbered assets of the mortgagor for its disbursements in connection with the receivership proceeding. In such cases the fees and compensation of the receiver and his counsel and the disbursements of the receiver are a charge upon the estate covered by the mortgage and may be included in the judgment against the mortgagor, but such expenses do not become a lien on other property of the mortgagor, except as a deficiency may be entered after the sale of the mortgaged property.

The Receiver in this case did not pretend to render any service for the benefit of the unsecured creditors or add to the value of the unincumbered estate, but several months after the mortgagors were adjudged bankrupts he is awarded, by the Court that appointed him, a prior lien upon the estate of the bankrupts that was unincumbered when they were adjudged bankrupts and the lien is for services rendered at the instance and for the benefit of a creditor having security on other property. Under the authorities cited, the District Court was without jurisdiction, power or authority to so embarrass the administration of the bankruptcy law.

It may be argued that counsel for the trustees consented to the order of July 14th, 1922, but their acquiescence in the agreement of the Irrigation District to pay the receiver's charges and expenses was given under circumstances as shown by the affidavits and

petitions in the record (pp. 82 to 100) that would in no event make such consent binding upon the trustees or the unsecured creditors.

The authority of counsel for the trustees in bankruptcy to create or consent to the creation of prior liens against the estate of the bankrupts cannot exceed the power of the trustees themselves in such matters, and it is well settled that trustees have no such power.

Section 27 of the Bankruptcy Act provides:

> "The trustee may, with the approval of the Court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

General Order 35 provides:

> "Whenever a trustee shall make application to the Court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy ,and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise."
>
> "Any compromise proposed by the trustee under Section 27 should be submitted to the creditors in accordance with Section 58 (7); and the action of the creditors thereon under Section 56 is

not absolutely conclusive, but may for good cause be disallowed by the Court under Section 27."

In re Heyman, 108 Fed. 207.
1 Collier on Bankruptcy, pp. 613-615.
In re Baxter, 269 Fed. 344.
In re Stier March Contracting Co., 245 Fed. 223.
In re Prudential Outfitting Co., 250 Fed. 504.
In re No. Hampton Portland Cement Co., 185 Fed. 542.

From the filing of the petition in bankruptcy the jurisdiction of the Bankruptcy Court is exclusive and the estate is regarded as in *custodia legis*, provided an adjudication is ultimately made.

Acme Harvester Co. vs. Beekman Lbr. Co., 220 U. S. 300, 56 L. Ed. 208.
U. F. & G. Co. vs. Bray, 225 U. S. 205, 56 L. Ed. 1055.
In re Diamond's Estate, 259 Fed. 70.

Manifestly there could be no dual administration of the affairs of the bankrupts—partly by the Receiver of the District Court for Oregon in the foreclosure suit, and partly by the Bankruptcy Court for Idaho, and it was the duty of the District Court for Oregon to direct its Receiver to turn over the assets, not covered by Appellee's lien, to the trustees in bankruptcy. There is no basis for the assumption that if the Receiver had a valid claim against the bankrupts, rather than against the mortgagee for whom he acted as Receiver, the Bankruptcy Court would not deal justly and fairly

with the Receiver for any service he had rendered and adjust his priority according to both law and equity.

ARGUMENT

Jurisdiction of Cause

Did the Court have jurisdiction of the cause so that it could appoint a Receiver or enter any valid order binding upon the parties or their successors, or upon the trustees in bankruptcy? It is alleged in the bill of complaint (Rec., p. 4), that Appelle is an *alien* and that the Jordan Valley Land and Water Company is a *Nevada* Corporation and the Jordan Valley Farms an *Idaho* Corporation, but the suit is brought in the District of *Oregon*.

We think there are a number of other grounds upon which this Court must hold that the District Court was without power or authority to impress a lien upon the estate of the Bankrupts in favor of the Receiver in the foreclosure suit and to require the payment thereof before it would permit the delivery of the estate of the Bankrupts upon which Appellee had no lien under its mortgage, to the trustees in bankruptcy, and, if so, it may not be necessary for the Court to pass upon the question of jurisdiction.

Section 2 of Article 3 of the Constitution, among other things, provides:

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution, * * * between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between *a*

state, or the citizens thereof, and foreign states, citizens or subjects."

Paragraph 1 of Section 24 of The Judicial Code is to the same effect.

Under the plain language of the Constitution and Statute, the judicial power of the courts of the United States is in such cases limited to controversies between an alien and the citizens of *a* state. Can this be extended to embrace controversies between an alien and the citizens of several states, sued in a state of which none of the defendants are citizens?

Attention is called to the decisions of the Supreme Court of the United States in Galveston, Etc. Co. vs. Gonzales, 151 U. S. 496, 38 L. Ed. 248 and in re Hohorst, 150 U. S. 654, 37 L. Ed. 1211, and to the decision of the Court of Appeals of the Second Circuit in Vidal vs. So. Am. Securities Company, 276 Fed. 855. The reason assigned by the Court in Barrow Steamship Co. vs. Michael Kane, 170 U. S. 100, 111, 42 L. Ed. 964, 968, for the Federal Courts having been invested with jurisdiction, does not exist in the case at bar.

If the Court was without jurisdiction of the cause, then, manifestly, it had no right to either withhold possession through the receiver or to impose conditions before it would deliver possession to the trustees in bankruptcy.

H. Humfield was a receiver pendente lite in aid of plaintiff in the foreclosure suit.

With the securities held by Appellee under its pledge were shares of stock in the Jordan Valley Water Com-

pany appurtenant to the lands described in the mortgages pledge with Appellee and evidencing the right of such lands to receive water from the irrigation system constructed by the Jordan Valley Land and Water Company (Rec. pp. 6-7). Appellee had possession of the collateral. It is alleged (Rec. p. 11):

> that each and all of the aforesaid collateral securities, mortgages and certificates of stock of the Jordan Valley Water Company are now in the possession of the plaintiff corporation at the City of Portland in the State of Oregon * * * and are subject to the jurisdiction of the above entitled court for the purpose of the foreclosure of the lien of the plaintiff thereon as expressly provided in the said memorandum of agreement."

Appellee further alleges (Rec. p. 12, Par. XVI):

> "that the lands covered by the collateral mortgages so assigned to plaintiff as security for said indebtedness are all under said irrigation project and dependent upon water therefrom for the successful cultivation of said lands and the production of crops thereupon, and if deprived of water, said lands will be of little value and great loss and suffering will be caused to the settlers owning and cultivating said lands, and the value of plaintiff's collateral security for said indebtedness will be greatly depreciated."

Appellee then alleges that a receiver is necessary in order that water may be delivered to the lands embraced

in the mortgages which it holds under its pledge and the prayer is (Rec. p. 23, par. 3):

> "That a receiver be appointed by the Court to take charge of the property and assets of each of the defendants and *in the disposition of this suit,* and that said receiver be authorized to operate the irrigation system of the Jordan Valley Land and Water Company by the order of the Court."

H. Humfeld, General Managing Agent of Appellee and the party that had made the loan and that was responsible for its collection, was thereupon appointed Receiver (Rec. pp. 97-98). The order provides (Rec. p. 25) that:

> "the said Receiver is ordered and directed to maintain the irrigation system of the defecdant Jordan Valley Land and Water Company and to operate the same, to the end that the mortgagors referred to in the bill of complaint, and their successors in interest, may have the water to which they are entitled, and *to the end that the securities listed in the bill of complaint may be preserved and protected from destruction in value.*" (Our italics.)

It cannot be successfully contended that Humfeld was a general receiver. He was the managing agent of the foreclosing plaintiff and no unsecured creditor was a party to the suit and clearly no court would for a moment consider appointing a foreclosing plaintiff a general receiver. As said by the Supreme Court in Smith vs. McCullough, 104 U. S. 25:

"Notwithstanding the broad terms of the order appointing him, we are satisfied that the Court had no purpose to appoint him receiver of any property except that covered by the mortgage."

See also Scott vs. Farmers Loan & Trust Co., 16 C. C. A. 358, 69 Fed. 17 and authorities cited in the Brief of The Argument.

We have here, however, a most unusual situation: at the instance of the foreclosing plaintiff and in aid of the foreclosure suit, his general agent is appointed Receiver of property not covered by the mortgage, thus taking the security away from the unsecured creditors and giving it to one that is already secured and charging the expense of the "operation" to the unsecured creditors.

We think the rule is that a mortgagee who obtains the appointment of a receiver in aid of his foreclosure suit and for the protection of the assets covered by his lien is not entitled to a receiver for the unincumbered assets of the mortgagor or a lien upon them for the expenses of the receivership proceedings. In such cases the fees and compensation of the receiver and his counsel and the disbursements of the receiver having been incurred for the benefit of the plaintiff in the foreclosure suit they should be added to the amount due plaintiff under his contract lien and included in the judgment against the mortgagor, and if the property covered by the lien is insufficient to meet the total charge, then the deficiency judgment as in other cases can be made a lien upon other property of the mortgagor.

The Receiver in this case did not pretend to render any service for the benefit of the unsecured creditors or add to the value of the estate not covered by the mortgages pledged with Appellee. The Receiver says in his application for the allowance of his compensation and expenses (Rec. pp. 47-48):

> "That because of the efforts of your petitioner (H. Humfeld, Receiver) the system has been maintained intact and the value of the farming land under the ditch has not been lost. That the land under the ditch is for the most part covered by mortgages pledged to plaintiff and for the foreclosure of which this suit is brought. That while the receivership has preserved a most valuable asset of the Jordan Valley Land and Water Company for the benefit of that corporation and for its creditors, it *has also been effectual in preserving the value of the lands which are pledged to plaintiff through the mortgages described in the complaint and which plaintiff has purchased at foreclosure sale held on the 23d day of June.*"

In other words, Appellee having obtained the benefit of the receivership and had its security enhanced through the efforts of the receiver, forecloses its pledge, buys in the security and leaves the receiver to collect from the unsecured creditors the entire cost of the proceedings instituted by Appellee and for Appellee's benefit and the Court makes the charge of the receivership a prior lien against the estate of the bankrupts and under the order of November 3, 1922 (Rec. pp.

102-103) it directs the receiver to sell the property without regard to the bankruptcy court or the trustees in bankruptcy or the unsecured creditors. If that order had not been stayed by the appeal, it would have effectually disposed of the estate of the bankrupts and the unsecured creditors would not have received a dollar, but the entire estate would have been exhausted in giving aid and the benefit of a receiver to appellee,—a secured creditor who had a lien on only a part of the estate.

The Supreme Court of Oklahoma in Thomas vs. Armstrong, 151 Pac. 689, L. R. A. 1916B, 1182, in passing on a receivership in aid of foreclosure says:

> "In deciding the remaining question, we are assuming, without deciding, that the court has power to appoint a receiver under the facts in this case, but, granting this, did it have power to appoint a receiver for all the property of the defendants within this state, when the property involved in the litigation was an undivided one-half interest? We think not. The court was without jurisdiction to appoint a receiver to take charge of property which was not involved in the litigation. (citing authorities.)
>
> "Had this been a foreclosure of his lien in an equitable action, the court could only have appointed a receiver for the property embraced in the mortgage. (citing a number of cases.)"

High on Receivers, Sec. 378 (4th Ed.) says:

> "Proceedings for the appointment of Receivers, in action for the foreclosure of railway mortgages

> are regarded as *in rem*, to the extent that they seek to reach such property of the corporation as was mortgaged to secure the bondholders. And the right of the receiver to the possession of the corporate property, being subject to the same limitations governing the rights of the mortgage bondholders in whose behalf he was appointed, extends only to the specific property which is the subject of the litigation and covered by the mortgage."

To the same effect is 1 Clark on Receivers, Sec. 47

The Court, therefore, not only had no authority to charge to the general creditors, the expense of a receivership for the benefit of the foreclosing plaintiff, but it had no authority to appoint a receiver for property not involved in the foreclosure suit. We have here the anomalous situation that the foreclosing plaintiff concluded its foreclosure suit, took the benefit of the receivership proceedings, sold the pledged assets and went its way, but left the receiver, with his claim for services and disbursements made for plaintiff's benefit, to collect from the unsecured creditors, or the estate of the bankrupts without regard to the proceedings in bankruptcy and without filing or submitting his claim to the bankruptcy court where it might be allowed if he could show that his services and disbursements had been of substantial benefit to the estate.

The operation of the bankruptcy law cannot be defeated or embarrassed by special receivers appointed at the instance of secured creditors and for their special benefit. The jurisdiction of the bankruptcy court is

essentially exclusive and receivers appointed by other courts should immediately turn over the property to the trustee in bankruptcy.

The authorities on these propositions are cited in the Brief of the Argument and we shall not encumber the brief by repeating them here.

Controversies of this character have nearly always arisen between receivers appointed in the state courts and the trustees in bankruptcy and while the state courts have frequently been jealous of their jurisdiction, they have nevertheless recognized the necessity for an orderly administration of the estates of bankrupts and have yielded to the bankruptcy court the power and right to administer the estate.

The Supreme Court of Georgia in Hanson vs. Stephens, 116 Ga. 722, in passing upon the question says:

> "While a fund raised by the sale of properties of an insolvent debtor through the medium of a receiver under the orders of a state court may on the application of a trustee, appointed after an adjudication of such debtor as a bankrupt, for a transfer of such fund in the state court to him be charged with the costs and expenses of converting the property of the debtor into cash, yet after the property of the debtor has been seized under the order of a state court and placed in the hands of a temporary receiver, and after the adjudication of such person as a bankrupt and before the conversion of his property into cash has been made by the receiver, the trustee, on application to the state court is entitled to possession of the property for

> the purpose of being sold and administered in the court of bankruptcy. And it is error on the part of the judge of the state court to order the transfer of such property to the trustee on condition that the fees for the attorney and receiver shall be first paid. 'When no fund is in the hands of the receiver out of which such payments can be made, the persons claiming to be paid out of the property must be remitted to the bankruptcy court for the adjudication and establishment of their respective claims.' "

The Circuit Court of Appeals for the Fourth Circuit in Hume vs. Myers, 242 Fed. 827, in a controversy between a receiver of one federal court and the trustee in bankruptcy of another federal court, in respect to the payment of receivership expenses and fees, says:

> "It is true that in many of the cases broad language is used in favor of the authority of courts to fix the compensation of their officers; but these cases related to allowances and payment from funds in hand, not to fixing charges upon specific property to be turned over to the bankruptcy court. (citing authorities) When the court of equity has not reduced the property to money, it is not in possession of that definite knowledge of the value of the property which is an important factor in finally fixing compensation.
>
> "Any real services, either of an assignee under a deed of assignment or of a receiver acting under judicial authority, will be allowed as a preferred

claim in the administration of the property and the distribution of its proceeds to the extent that the services have benefited the estate. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. But orders for such allowances are purely administrative, subject to entire disallowance or change by either increase or decrease with the development of the administration. The order of Judge Waddill of the Eastern District making allowance to the Receivers was purely administrative. It was subject to change at his discretion at any time at least before actual payment, as long as he had the responsibility of administration. When the responsibility of administration fell upon Judge McDowell, with it came the power to exercise the same discretion. The point of logical contradiction, not to say absurdity, is reached when it is said that an allowance which Judge Waddill could have revoked, or increased or diminished, at his discretion, attached to the property as it passed to the bankruptcy court as an unalterable judgment beyond the control of the judge of the bankruptcy court.

"The true rule is this: When a court of equity appoints receivers of corporate property, its allowance to its receivers and their attorney is an administrative order, presumptively right as to the justice of the allowance. When the corporate property falls by operation of law into the bankruptcy court, that court by comity will indulge the presumption in favor of the correctness of the

allowance; but the court of bankruptcy, having the responsibility of administration, must exercise its independent judgment, giving due weight to the presumption in favor of the administrative finding of the court of equity. This, we think, is what the Supreme Court meant in the case of In re Watts, 190 U. S. I, 23 Sup. Ct. 718, 47 L. Ed. 933, when it said:

" 'It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way.'

"The rectification of errors in due course and in the designated way here referred to must mean rectification by the bankruptcy court, for after the assets are turned over to that court all orders relating to the matter must emanate from that court."

The District Court for Oregon fixed the amount due the receiver and his counsel at approximately $9,100 without knowing whether the entire estate which the receiver was to turn over to the bankruptcy court would sell for even one-half of the amount so allowed. Clearly, if the property which the receiver held was worth only $5,000, the allowance made might well be considered unreasonable for it ought to be the purpose

to so administer an estate that there will be something left for those for whom it is being administered.

The Circuit Court of Appeals for the Sixth Circuit In re Diamond's Estate, 259 Fed. 70, considers at some length and cites many authorities on the power of the bankruptcy court to demand the surrender to it for administration the assets of the bankrupt, although in the possession of a receiver appointed by another court. The court says:

> "The broad question involved is whether the bankruptcy court had power, by summary order, to compel the state court receiver to turn over to the bankruptcy court, to await its action upon the question of compensation, fees and disbursements of that receiver. We think this question must be answered in the affirmative."

The Court then proceeds to examine the authorities and adds:

> "Any other rule would, pro tanto, take the ultimate distribution of the assets of the bankrupt estate out of the hands of the bankruptcy court."

In that case the Supreme Court denied a petition for certiorari.

Frankenstein vs. Jacobs, 249 U. S. 614.

The circumstances under which the order of July 14th was made are fully stated in the affidavits of E. M. Hoover, J. H. Richards, Leslie J. Aker and T. H. Wegener (Rec. pp. 82-100) and the District Court should have set aside that order, but in face of the

showing made it granted the petition of the Appellee for the sale of the property (Rec. p. 81) and made the order of November 3d (Rec. p. 102.)

Clearly, the trustees in bankruptcy and their counsel were without authority to agree to the receiver's charges being made a prior lien upon the estate of the bankrupts; such an agreement was to take the estate from the jurisdiction of the bankruptcy Court and it might exhaust the entire estate and leave nothing for the creditors and such is in fact the effect of the order in this case. Trustees in bankruptcy have extremely limited powers. Their authority in such matters is comparable with that of a guardian *ad litem*. His powers are strictly limited to matters connected with the suit in which he is appointed and his acts with respects to the infant's rights concerning any other matters are unauthorized.

> "The guardian *ad litem* or next friend can make no concessions; he can not waive or admit away any substantial rights of the infant, or consent to anything which may be prejudicial to him; but he may make a valid consent or waiver to matters which merely facilitate a trial and can not prejudicially affect the rights of the infant."
>
> 22 Cyc 663.

A trustee in bankruptcy has no power to compromise claims against the estate without the consent of the creditors and the bankruptcy court.

> Sec. 27 of the Bankruptcy Act.
>
> General Order No. 35 and cases cited in support

of this proposition in the Brief of the Argument.

Other questions arising upon the face of the record are discussed in the Brief of the Argument, and, without waiving any of the points there discussed, we submit that the order of July 14th and the order of November 3, 1922, by the District Court for Oregon should be set aside and the Receiver instructed forthwith to surrender the property in his possession belonging to the bankrupts to the trustees in bankruptcy free of the lien attempted to be created for the fees, compensation and disbursements of the receiver and his counsel.

Respectfully submitted,

RICHARDS & HAGA
C. E. WINSTEAD,
Solicitors for E. M. Hoover, Trustee of the Estate of the Jordan Valley Land and Water Company, a Bankrupt.

LESLIE J. AKER,
Solicitor for T. H. Wegener, Trustee of the Estate of the Jordan Valley Farms, a Bankrupt.
Residence: Boise, Idaho.

No. 3987

United States Circuit Court of Appeals for the Ninth Circuit

E. M. HOOVER, as Trustee of the Jordan Valley Land & Water Company, a bankrupt, and T. H. WEGENER, as Trustee of the Jordan Valley Farms, a bankrupt,

Appellants,

vs.

MORTGAGE COMPANY FOR AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Oregon

BRONAUGH & BRONAUGH,
Solicitors for Appellee,
Residence: Portland, Oregon.

Filed....., 1923.

.....Clerk.

IRWIN-HODSON

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vs.

MORTGAGE COMPANY FOR AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Oregon

Statement of the Case

The facts material to the consideration of the questions raised by the appeal are that on the 23rd day of September, 1921, an order of the District Court was passed requiring the defendants Jordan Valley Land & Water Company and Jordan Valley Farms to appear on the 29th day of September, 1921, at the hour of

10:00 a. m., then and there to show cause why a receiver should not be appointed to take charge of their respective properties. This order was duly served on each of the defendant corporations on the 26th day of September, 1921, and due proof of such service made in said Court and cause, and on the 29th day of September, 1921, an order was passed by the District Court appointing a receiver. (Record pp. 24-26.)

On March 10, 1922, nearly six months after the appointment of the receiver, the defendant Jordan Valley Land & Water Company, was adjudged bankrupt by order of the District Court of the United States for the District of Idaho, Southern Division, and thereafter the appellant E. M. Hoover, was appointed trustee in bankruptcy of said bankrupt corporation. (Record pp. 43-45.)

That on the 10th day of March, 1922, nearly six months after the appointment of the receiver, the defendant corporation Jordan Valley Farms was adjudged bankrupt by said District Court of the United States for the District of Idaho, Southern Division, and thereafter the appellant T. H. Wegener was appointed trustee in bankruptcy for said bankrupt corporation. (Record pp. 67-68.)

After the sale of the mortgaged securities under the decree of foreclosure, and on the 27th day of June, 1922, the receiver presented to the Court his petition for an order allowing his expenses and fixing compensation for himself and his counsel. (Record pp. 46-53.) Prior to

this time, however, and on May 4, 1922, the appellant E. M. Hoover as trustee in bankruptcy of the Estate of the Jordan Valley Land & Water Company, filed in said Court and cause this petition for delivery to him by the receiver of Jordan Valley Land & Water Company of certain properties held by the said receiver (Record p. 38) and on the 8th day of July, 1922, the appellant T. H. Wegener, as trustee in bankruptcy of Jordan Valley Farms, filed his petition in said Court and cause for the delivery to him of certain properties owned by the receiver. (Record p. 54.) The appellant Hoover as trustee, filed an answer to the petition of the receiver (Record p. 56), the receiver filed an answer to the petition of the appellant Hoover (Record p. 63), the receiver filed an answer to the petition of the appellant Wegener (Record p. 65), and the appellant Wegener filed an answer to the petition of the receiver (Record p. 67). The matters raised by said petitions and answers came on for hearing before the District Court on July 14, 1922, and on said July 14, 1922, the District Court duly passed its order allowing compensation to the receiver for his services as receiver of Jordan Valley Land & Water Company, and also making allowance to the receiver for compensation for his counsel, and making such allowances to the receiver and his counsel a specific lien upon the assets of the defendant Jordan Valley Land & Water Company, and also making allowance to the receiver for his compensation as receiver of Jordan Valley Farms and for his expenses on that behalf, and making such allowances a specifie lien on the assets of the Jordan Valley Farms in the hands of the receiver.

This order was made after a hearing before the Court at which the receiver appeared by his counsel, Wallace McCamant and Earl C. Bronaugh, and the appellant E. M. Hoover as trustee in bankruptcy, appeared by Richards & Haga, his attorneys, and the appellant H. H. Wegener, as trustee in bankruptcy, appeared by L. J. Aker, his attorney (Record p. 78). By this order, it was expressly provided that the appellee pay the allowances to the receiver, and that on such payment the appellee be subrogated to the rights and lien of the receiver, and it was expressly provided and ordered that the receiver turn over to the respective trustees in bankruptcy the assets of the defendant corporations when the charges allowed by the order shall have been paid in full, and not otherwise.

In obedience to said order the appellee made payment of the allowances made by the said order of July 14, 1922, and after more than three months had elapsed without the appellee having been reimbursed for such payment so made by it, the appellee presented its petition to the District Court for an order directing the receiver to sell the assets in his possession to satisfy the amounts so paid by the appellee under the order of July 14, 1922 (Record pp. 81-82). Thereupon, the appellant T. H. Wegener, as trustee in bankruptcy for Jordan Valley Farms, filed his petition asking that the order dated July 14, 1922, allowing the receiver's fees and expenses to be vacated (Record p. 100). No petition for the vacation of said order was made by the appellant E. M. Hoover. The petition of the appellant Wegener and the several affidavits in support thereof

(Record pp. 82-101) were filed on October 30, 1922, the day upon which the appellee's petition for sale of the assets was set for hearing, and both said petitions were heard on that day, both the appellant Wegener and the appellee being in Court by their respective counsel, and on that day the Court directed that an order be entered for the sale of the assets, which order appears at page 102 of the record, although the order was not signed until the 3rd day of November, 1922.

Brief of Argument

The Oregon law provides for service upon non-resident defendants in suits to foreclose liens on personal property.

Oregon Laws Comp. 1920, Sec. 399.

And jurisdiction in the Federal Court for the District of Oregon to foreclose such liens is specifically provided by the judicial code, and has been held to apply alike to real and personal property.

Federal Judicial Code, Sec. 57.
Dick v. Foraker, 155 U. S. 405, 39 Law Ed. 201.
Jellenik v. Huron Copper Mining Co., 177 U. S. 7.
Louisville & N. R. Co. v. Western U. Tel. Co., 234 U. S. 374, 58 Law Ed. 1359.
Johnson v. North Star Lumber Co., 206 Fed. 624.

It is the law in Oregon that appearance by the defendant, unless it is special, gives the court jurisdiction of the person.

Oregon Laws, Sec. 63.

Roethler v. Cummings, 84 Ore. 442, 165 Pac. 355.

Duncan Lumber Co. v. Willapa Lumber Co., 93 Or. 386, 182 Pac. 172, 183 Pac. 476.

Such also is the rule in the Federal courts.

Johnson v. North Star Lumber Co., 206 Fed. 624.

Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 52 Law Ed. 1101.

St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 Law Ed. 659.

It is well settled by a long line of authorities that where jurisdiction over the subject-matter depends upon diverse citizenship, and the parties are in fact citizens of different states, the objection that the suit is brought in a district where neither is an inhabitant does not survive general appearance; and when the plaintiff is an alien, the same jurisdiction over the subject matter exists as when there is diversity of citizenship.

Interior Construction Co. v. Gibney, 160 U. S. 217.

Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547.

The courts of the United States are vested with general jurisdiction of civil actions, involving requisite pecuniary value, "between a state or the citizens thereof, and foreign states, citizens or subjects". Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action dismissed. But the provision as to the *particular district* in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or waive at his election; and the defendant's right to object that an action within the general jurisdiction of the court, is brought in the wrong district, is waived by pleading to the merits.

Interior Construction Co. v. Gibney, 160 U. S. 217.
Gracie v. Palmer, 8 Wheat. 699.
Ex parte Schollenberger, 96 U. S. 369, 378.
St. L. & S. F. Ry. v. McBride, 141 U. S. 127.
Texas & P. Ry. v. Saunders, 151 U. S. 105.
Central Trust Co. v. McGeorge, 151 U. S. 129.

Where diversity of citizenship exists, as it does here, so that the suit is cognizable in *some* Federal Court, the objection that there is not jurisdiction in a particular district is waived by appearing and pleading to the merits.

In re Moore, 209 U. S. 490.
Western Loan Co. v. Butte & B. Min. Co., 210 U. S. 368.
Johnson v. North Star Lumbr. Co., 206 Fed. 624.

When upon a hearing in equity in district court, or by a judge thereof in vacation, an interlocutory order shall be made appointing a receiver, an appeal may be taken from such interlocutory order, to the circuit court of appeals; but such appeal must be taken within thirty days from the entry of such order.

Judicial Code, Sec. 129.

No appeal having been taken, within the statutory time, or at all, from the order appointing the receiver and directing him to take charge of all the assets of the defendant corporations, that order cannot be reviewed upon this appeal from a later order.

Hereford v. Hereford, 134 Ala. 321 (32 So. 651).
Leinkauff v. Tuscaloosa Sale &c. Co., 105 Ala. 328 (16 So. 891).

Expenses and compensation of receiver and the fund or property from which payment of same shall be made are matters within the discretion of the court appointing the receiver.

Hall v. Stubb, 126 Ga. 521, 55 S. E. 172.
Northrup Nat'l Bank v. Varner, 109 Pac. 394 (Kan.)

Eames v. H. B. Claflin Co., 231 Fed. 693.
Trustees v. Greenough, 105 U. S. 527, 26 Law Ed. 1157.
Stuart v. Boulware, 133 U. S. 78, 33 Law Ed. 568.

Expenses and compensation of receiver may be paid out of assets remaining in hands of receiver after sale of mortgage property.

Strain v. Palmer, 159 Fed. 628.
Clark v. Brown, 119 Fed. 130.
Mauran v. Crown Carpet Co., 50 Atl. 387 (R.I.)

It is a general rule that an appeal will not lie from an order or decree entered by consent of parties.

3 C J., Sec. 546, p. 671.
U. S. v. Babbitt, 104 U. S. 767; 26 L. Ed. 921.
Ballot v. U. S., 171 Federal 404.
Talbot v. Mason, 125 Federal 101.
Eustis v. Henrietta, 74 Federal 578.
Pacific R. R. Co. v. Ketchum, 101 U. S. 289; 25 L. Ed. 932.

Where a judgment or order is rendered pursuant to an agreement of the attorneys of the parties, the Court on appeal must assume that the lower Court found that the attorneys had authority to make the agreement.

Monk v. Wabash R. Co., 150 S. W. 1083; 163 Mo. App. 692.
Pacific R. R. Co. v. Ketchum, 101 U. S. 281, 296; 25 L. Ed. 932.

Even though a consent judgment or order may be void for want of authority no appeal will lie therefrom the proper remedy being to move the Court to set it aside and then appeal from his order denying such motion.

Monroe County Court v. Miller, 132 Ky. 102, 116 S. W. 272.

Where the property at the time of bankruptcy is in the possession of a receiver appointed outside of bankruptcy, and the receivership is created within the four months preceding the filing of the bankruptcy petition, upon the adjudication of bankruptcy occurring, the Bankruptcy Court supersedes the Court appointing the receiver and takes over the property involved for administration in bankruptcy.

1 Remington on Bankruptcy, Secs. 1602, 1625.
McGahee vs. Cruickshank, 133 Ga. 649 (66 S. E. 776).
Stacy vs. McNicholas, 76 Or. 167-188.

But where more than four months have elapsed from the appointment and qualification of the receiver to the filing of the petition in bankruptcy, the Court first obtaining jurisdiction of the "res" retains it to the end.

Southwell vs. Church, 51 Tex. Civ. App. 547, 111 S. W. 969.
High on Receivers, 4th Ed., Secs. 50, 52.
Gaylord vs. Ft. Wayne, Etc. Co., Fed. Cas. No. 5284, 6. Biss. 286.

Where property is in custody of the receiver more than four months prior to filing petition in bankruptcy, receivership is not terminated by adjudication in bankruptcy.

1 Collier on Bankruptcy, 12th Ed. p. 558.
Blain vs. Brailey, 221 Fed. 1.

Where trustee in bankruptcy applies to Court appointing receiver for order to deliver property to trustee, the Court appointing the receiver may retain the costs and compensation for its officer.

IV. Pom. Eq. Juris, Sec. 1591.
High on Receivers, 4th Ed., Sec. 796b.
McGahee vs. Cruickshank, 133 Ga. 649 (66 S. E. 776.)
First Nat. Bank vs. Zangwill, 61 Fla. 596, 54 So. 375.
Stacy vs. McNicholas, 76 Or. 167-185.

If receiver has expended a large sum, or involved himself in future liabilities, the Court may secure him before directing delivery of possession.

Hull vs. Storagehouse, 152 N. Y. Supp. 363.

Argument

This suit was brought to foreclose a lien upon certain notes secured by mortgages on real property in Malheur County, State of Oregon, the lien having been created to secure a loan of money to the defendants.

The complaint specifically avers that the personal property upon which the liens are claimed is within the possession of a trustee in the complaint named, and within the State of Oregon and the jurisdiction of the trial court.

The District Court for the District of Oregon had jurisdiction of the cause for two reasons: (a) by the practice under the law of Oregon, and the specific provision of the judicial code of the United States the court could entertain the suit because it is of a local nature; and (b) the defendants by their actions in court waived the right to question the jurisdiction of the person.

A

Not only does the Oregon law provide for service upon non-resident defendants in suits to foreclose liens on personal property (and the federal court in that regard will consider the state practice) but jurisdiction in the federal court for the district of Oregon is specifically provided by the judicial code.

Oregon Laws, Sec. 399.

> "In addition to the cases enumerated in the subdivisions of section 56, service of the summons may be made by publication in the following cases:
>
> 1. When the subject of the suit is real or personal property in this state, and the defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or

partly in excluding the defendant from any lien or interest therein;"

Federal Judicial Code, Sec. 57.

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks."

Thereafter follows provisions that if the defendants do not appear the judgment of the court can reach the property only as a proceeding in rem.

The jurisdiction so provided by Section 57 of the Judicial Code has been held to apply alike to personal property and real property.

Dick v. Foraker, 155 U. S. 405; 39 L. Ed. 201.

This case involved a suit to quiet title to land in the state of Arkansas brought in the Federal Court for that state by a citizen of Ohio against a citizen of Illinois. After holding that this is a suit made local in its nature by Section 57 of the Judicial Code, the court took up the contention that the use of the words "one or more defendants" in Section 57 meant that at least one of the defendants must be a resident of the district in which suit is brought. The history of the act is discussed and the court comes to the conclusion that it is immaterial whether there be one or more defendants.

> "Section 737 provides for a case where there are 'several defendants' and 'one or more' may be outside of the district: the Act of 1875, on the contrary, provides for a case where 'one or more of the defendants' may be outside of the district, the difference between the two being that which exists between 'one or more of several' and 'one or more.' The demurrer was, therefore, correctly overruled."

Jellenik v. Huron Copper Min. Co., 177 U. S. 7; 44 L. Ed. 647.

This case involved personal property. As stated by the court, "one of the objects of the present suit was to remove an incumbrance or cloud upon the title to certain shares of the stock of a Michigan corporation." There existed a lack of diversity of citizenship as to certain of the defendants and the bill was dismissed for want of

jurisdiction because those defendants were indispensable. The court holds that the defendants are indispensable but construes Section 57 of the Judicial Code (Section 8 of the Act of 1875) to apply to both personal property and real property, and then says that the situs of corporate stock is where the books of the company are kept, and as these books were within the jurisdiction of the court the court had jurisdiction of the cause.

Louisville & N. R. Co. v. Western U. Teleg. Co., 234 U. S. 374, 58 L. Ed. 1359.

Here a Kentucky corporation in the Federal Court for the state of Mississippi sued a New York corporation to remove a cloud upon real property created by certain state judgments alleged to be void. The Judicial Code regarding the venue of actions and jurisdiction of the person of defendants is again construed; Section 57 is quoted in full and then the court said:

> "It will be perceived that this section not only plainly contemplates that a suit 'to remove any encumbrance, lien, or cloud upon the title to real or personal property' shall be cognizable in the District Court of the district wherein the property is located, but expressly provides for notifying the defendant by personal service outside the district, and, if that be impracticable, by publication. The section has been several times considered by this court, and, unless there be merit in an objection yet to be noticed, the decisions leave no doubt of its applicability to the present suit, even though both parties reside outside the district."

After holding that there was no merit in the objection mentioned as yet to be considered, the court further says that Section 57 embraces suits which may be founded upon the remedial statutes of the several states.

> "We conclude that the provision in Section 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several states, as well as when resting upon established usages and practice in equity."

Johnson v. North Star Lumber Co., 206 Fed. 624, Ninth Circuit Court of Appeals.

Here the Circuit Court of Appeals for this circuit again applies the rule that the Federal Court will enforce rights that could be enforced under the state law if a diversity of citizenship exists as it does in the case at bar.

> "In such a suit, where a diversity of citizenship exists as it does here, the Circuit Court of the United States for the district of Oregon had jurisdiction of the controversy, and, the action being local to that district, the court had jurisdiction over the subject-matter."

See also:

Chase v. Wetzlar, 225 U. S. 79; 56 L. Ed. 990.
Single v. Scott Paper Mfg. Co., 55 Fed. 553.

Pennington v. Fourth National Bank, 243 U. S. 269; 61 L. Ed. 713.

In the case last cited the court holds that jurisdiction dependent upon constructive service extends alike to tangible and intangible property, and that such property may be subjected to the action of the court by a trustee or injunction process, as well as by garnishment or attachment. We call the attention of the court to the fact that in the case at bar the court has taken possession of the property involved by the appointment of a receiver.

B

The defendants made a number of general appearances. It is the law in Oregon that an appearance by the defendant, unless it is special, gives the court jurisdiction of the person.

Oregon Laws, Sec. 63.
Roethler v. Cummings, 84 Or. 442; 165 Pac. 355.
Duncan Lumber Co. v. Willapa Lumber Co., 93 Or. 386; 182 Pac. 172; 183 Pac. 476.

In the latter case on rehearing at page 403 of the Oregon reports is an excellent discussion distinguishing between jurisdiction of the subject-matter and jurisdiction of the person, and holding that the offering of a contest on the merits waives any objection to jurisdiction of the person.

Such is the rule in the Federal Courts, which hold that an appearance preceding the motion or a motion to dismiss which goes to the merits as well as to jurisdiction of the person, or the joinder of a motion to dismiss and an answer on cross complaint, will alike give the court jurisdiction and waive the objection of venue.

Johnson v. North Star Lumber Co., 206 Fed. 624, Ninth Circuit.

Here an objection to the jurisdiction of the court was either coupled with or followed by an answer and cross-bill.

> "Further, the defendant, by answering the bill of complaint on the merits, and by filing a cross-bill submitting his title to the jurisdiction of the court and praying for affirmative relief, waived any objection he might otherwise have had to the jurisdiction of the Circuit Court of the District of Oregon. Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101."

Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368; 52 L. Ed. 1101.

Suit in Montana by citizen of Utah against a citizen of New York. A demurrer was filed challenging the jurisdiction of the court as to (a) subject-matter, and (b) person of the defendants; also said demurrer asserted that the complaint did not state facts sufficient, was uncertain and unintelligible. The court held that

this joinder of contentions by demurrer waived the objection of venue and again said that the court would follow the state practice.

> "So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under sections similar to Section 1820 of the Montana Code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States circuit court, as is shown by the case of Shaw v. Quincy Min. Co. (Ex parte Shaw), 145 U. S. 444, 36 L. Ed. 768, 12 Sup. Ct. Rep. 935—a suit in a district in the state of New York. In that case the parties were a citizen of Massachusetts and a corporation of Michigan, being citizens of states other than New York. A motion was made entering a special appearance for the purpose of setting aside the service. This manner of raising the question, it was held, did not amount to a waiver of the objection to jurisdiction. The same course was pursued with the approval of this court in Re Keasbey & M. Co. supra."

St. Louis and San Francisco R. Co. v. McBride, 141 U. S. 127; 35 L. Ed. 659.

Here again a defendant, attacking the venue, demurred on the grounds: (a) want of jurisdiction of the person of the defendant; (b) want of jurisdiction of the subject-matter, and (c) because the complaint did not state facts sufficient. The court said:

> "Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

Interior Construction & Improvement Co. v. Gibney, 160 U. S. 219; 40 L. Ed. 401.

In this case, as in the case at bar, non-resident defendants entered an appearance and then moved to dismiss for want of jurisdiction of the person, but the court held that this general appearance waived the jurisdictional objection.

Central Trust Co. v. McGeorge, 151 U. S. 133; 38 L. Ed. 100.

This was an action against non-residents of the district and did not involve a local question. The defendants, however, appeared and agreed to the appointment of a receiver. The court held that this waived the objection on jurisdictional grounds.

Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547.

This was a suit brought in the District Court of the United States for the Eastern District of New York, by an alien against a citizen and resident of Pennsylvania. The Circuit Court of Appeals held:

> "It is well settled by a long line of authorities that where jurisdiction over the subject matter depends upon diverse citizenship, and the parties are in fact citizens of different states, the objection that the suit is brought in a district where neither is an inhabitant does not survive general appearance". (Citing Interior Construction Co. v. Gibney, *supra.*) "That is to say, the limitations imposed by Congress as to the place of trial are only for the convenience of the defendant, and do not involve jurisdiction of the court at all, properly speaking. The difference of opinion which at one time existed in the case of removed causes (citing cases) never applied to those of original jurisdiction.
>
> "When the plaintiff is an alien, the same jurisdiction over the subject-matter exists as when there

> is diversity of citizenship * * *. There is no conceivable reason why a different rule should apply to the case of an alien suing a citizen out of the proper district, from that which governs a citizen so suing."

We submit that the Court has jurisdiction both because of the specific provisions of the Judicial Code, and because of the general appearance repeatedly made by the defendants.

The complaint alleged the insolvency of the defendants, and the inability of the Jordan Valley Land and Water Company to finance the operation of its irrigation project or to keep the same in proper operation, and that unless properly operated and cared for during the fall of 1921 and the winter next ensuing so that adequate water supply might be stored in the reservoir, agricultural operations of the settlers could not be carried on, and that it was necessary for the conservation of plaintiff's security and for the agricultural operations of the settlers upon the lands that a receiver be appointed by the court to operate the said irrigation system (Record p. 13). In the order appointing the receiver the court found "that it is necessary to preserve the properties mortgaged, and to that end to operate the irrigation system now owned by the defendant Jordan Valley Land and Water Company", and directed the receiver to maintain said irrigation system and operate the same to the end that the mortgagors referred to in the bill of complaint may have the water to which they are entitled, and to the end that the securities listed

in the bill of complaint may be preserved and protected from destruction in value.

Even if this were a timely and direct appeal from the order appointing the receiver, we submit that the appellate court would not be inclined to sit in review of the finding of the trial court that the appointment of a receiver was necessary to the preservation of the property, especially where, as in this case, there is nothing in the record from which the court could draw a conclusion that the action of the court below was erroneous or an abuse of discretion. But clearly, under the provisions of Section 129 of the Federal Judicial Code, the time within which this court might have reviewed the order appointing the receiver, expired long before this appeal was taken.

The burden of appellant's argument is that the receivership was entirely for the benefit of the appellee and the preservation of its security. Such is not the case. The primary purpose was to protect the settlers in their right to receive water for their lands which are subject to the mortgages held as collateral by the appellee. The preservation and operation of the system enured to the benefit, not only of the settlers whose mortgages are held by appellee, but of all others who have invested their money in lands under said irrigation system. More than this, by preserving the system and keeping it in operation, it enhanced the chances of the system being sold to advantage, and thus enured directly to the benefit of general creditors whose trustees are here complaining because the court has sought to pro-

tect its receiver in his expenses and compensation for efforts expended for the benefit of these same creditors.

No citation of authority is needed to support the proposition that court has power to see that its receiver is compensated for services rendered and expenses incurred in the discharge of his functions. Nor is it required that the receiver be paid out of the assets constituting the security sought to be foreclosed. This honorable court has clearly settled that question.

The case of *Strain v. Palmer, 159 Fed. 628* (Ninth Circuit) is singularly in point. There a receiver was appointed to collect the rents, issues and profits of mortgaged lands under process of foreclosure. The lands sold for enough to pay the debt in full with all the costs of foreclosure. A creditor of the mortgagor objected to the payment of the receiver's charges out of the assets remaining in the hands of the receiver. This honorable court said:

> "The objections of the appellant to the report and account of the receiver were properly overruled. In the report and account the receiver claimed credit for expenses incurred by him in the discharge of his duties as receiver. The objections of the appellant to the allowance of this account were based upon the fact, as shown in the said receiver's report, that at the sale of the said real estate in pursuance of the decree of this court the complainant herein purchased all of the said real estate for a sum sufficient to cover their mortgage

indebtedness, interest and costs, so that the said mortgage thereby became satisfied in full, without recourse to the said hay and oats which, had theretofore, to-wit, on the 17th day of August, 1904, been purchased by the appellant. The court acted within its jurisdiction in appointing the receiver, and, this being so, he had the right to resort to the property in his possession as such receiver for the payment of his expenses in connection with such property and his compensation as receiver. 'When it becomes the duty of a court of equity to take property under its charge through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of, and saving it, including the allowance to the receiver for his services.' Ferguson v. Dent (C. C.) 46 Fed. 88; Elks Fork Gas Co. v. Foster, 99 Fed. 495, 39 C. C. A. 615."

"This rule is not changed by the fact, shown by the record in this case, that after the receiver was appointed the mortgaged premises were sold, under the decree of foreclosure in the action in which the receiver was appointed for an amount sufficient to pay the indebtedness secured by the mortgage and the costs of the action."

The situation that confronts us in this case is a somewhat peculiar and unusual one. The securities acquired by appellee through its foreclosure in this suit consist, as has already been noted, of notes and mortgages given by settlers under the Jordan Valley Project and as-

signed to the appellee. The lands covered by the mortgages are dependent upon the Jordan Valley Irrigation System for water, without which the lands would be practically valueless. The owner of the irrigation system is bankrupt, and for nearly two years has ceased to function in the operation of the irrigation system or otherwise and the system was kept in operation by the receiver under the order of the Court. Appellants complain because the receiver was the managing agent of the appellee. No valid basis for such complaint exists. The irrigation system could not be kept in operation without money. The appellants could not supply any money. Conditions were such that no stranger would furnish funds, and it was only an interested party like the appellee who would be willing to advance the expenses necessary to keep the system in operation. Appellants have called attention of the Court to the fact that the settlers have organized an irrigation district under the State law, and are seeking to acquire the Jordan Valley Irrigation System as a part of the system to be operated by the district, and appellants charge that a conspiracy exists between the newly formed irrigation district and the appellee and the receiver, to enable the district to acquire the system at a price not in excess of the amount allowed the receiver. No foundation for this charge exists whatever. Let us pause and reflect that if the system should be turned over to the trustee in bankruptcy, as petitioned for, all that the trustee could do would be to sell the same under bankruptcy proceedings. We fail to see upon what possible theory the property could be sold by the trustee for any

larger sum than it could be sold for by the receiver. Either sale would be at public auction to the highest bidder, and subject to the approval of the Court, so that the charge that the receiver would sell the property at a price which would in effect defraud the general creditors of the bankrupt, is a wholly gratuitous assumption. Considering the case from this angle, the suspicion naturally arises that what the appellants are really attempting to do by this appeal is to compel the irrigation district to buy peace by paying to the trustee a larger sum for the assets than they would possibly bring at either a receiver's or trustee's sale in the ordinary course. The Court can readily see the situation that confronts the settlers under the irrigation project. The corporation responsible to the settlers for the operation of the system is bankrupt and wholly unable to function. The irrigation district cannot successfully function until it acquires control of the irrigation system. Without water the lands of the settlers are practically valueless and the settlers left to face bankruptcy themselves and the loss of their land through foreclosure. It cannot be presumed that in this deplorable situation the assets in the hands of the receiver will enhance in value with the progress of time, and it would seem that unless these assets are permitted to be sold and the irrigation system put into the hands of some one competent and qualified to operate it, the inevitable result will be irreparable loss and damage to all concerned. Each tract of land under the project was entitled to a specific quantity of water for irrigation. This water was appurtenant to the land and not merely

a personal right in the land owner. The settlers or any of them, in view of the insolvency of the appellants and the danger of loss confronting the settlers, would certainly have had a right to commence a suit in equity for the appointment of a receiver of the insolvent corporations to operate the irrigation system and thereby conserve the rights of the settlers. The holder of the mortgages involved in the foreclosure had a similar, if not equal, interest in the maintenance of the irrigation system, and it would seem equally true that the appellee as holder of the mortgages, might have commenced a suit independent of any foreclosure proceedings to have a receiver appointed for like purposes. The complaint filed by the appellee in this suit was in effect more than merely a bill to foreclose lien upon collateral security. It was in effect a bill against an insolvent corporation for the appointment of a receiver to conserve assets not included directly in the mortgage security, but of vital concern to the maintenance of the value of the mortgage security. Appellants' brief contains an argument of much length with citation of numerous authorities that it is the duty of the receiver of a Court of equity to give way to a trustee in bankruptcy and surrender the assets of the bankrupt to the trustee. We think an examination of these authorities will show that they were all cases where the adjudication of bankruptcy occurred within four months from the date of the appointment of the receiver, and this circumstance distinguishes those cases from the case at bar and renders them valueless as a guide to the solution of the question confronting us. It appears upon the face of the appel-

lants' record that nearly six months elapsed between the date of appointment of a receiver and the filing of the petition in bankruptcy in the District Court for Idaho. Under these circumstances, we submit that the trustee in bankruptcy is not entitled to dispossess the receiver appointed by the District Court in Oregon. The assets which the appellants seek to have turned over to the trustee in bankruptcy consist largely of an irrigation project in Malheur County, Oregon, and within the jurisdiction of the Court appointing the receiver. One of the bankrupts is a Nevada corporation and the other an Idaho corporation, and the bankruptcy proceedings were instituted in Idaho. The law is thus stated in High on Receivers, 4th Edition. Section 50:

> "Questions of considerable controversy and importance have frequently arisen under our peculiar judicial system touching the relative powers of the State and Federal Courts in the appointment of receivers over the same subject matter in litigation in both tribunals. These questions have usually been determined upon principles of comity and it is now the established doctrine of both State and Federal Courts that that Court, whether State or Federal, which first acquires jurisdiction of the subject matter or of the res, and which is first put in motion, will retain its control to the end of the controversy and the possession of its receiver will not be disturbed by the subsequent appointment of a receiver by the other Court;"

and in the same text, Section 52, it is stated thus:

> "The Federal Courts have generally recognized the doctrine under discussion, and have almost uniformly conceded the jurisdiction to the State tribunals when the latter have first acquired control over the subject matter and the parties, or when the receiver of the State Court has first acquired possession of the assets, even when the conflict of jurisdiction has been presented to the United States Courts in the course of proceedings in bankruptcy there."

In I Collier on Bankruptcy, 12th Edition, page 558, it is stated:

> "The right of a State Court through receivers appointed by it, to administer property of one subsequently adjudged bankrupt, brought within its grasp, under its process, more than four months prior to the filing of its petition in bankruptcy is not terminated by an adjudication in bankruptcy."

Blair vs. Brailey, 221 Fed. 1.

In this case, it appears that more than six months before filing of petition in bankruptcy in the United States District Court for the Northern District of Ohio, receivers were appointed in the District Court for the Southern District of Georgia, who, pursuant to the orders of that Court and more than six months before the institution of the bankruptcy proceedings, took possession of the property of the defendant and thereafter continued to administer it under the orders of the Court.

The trustee in bankruptcy thereafter filed in the Georgia Court a petition that he, as such trustee be recognized as entitled to the possession of all the property and assets of the bankrupt as of the date of the filing of the petition in bankruptcy, and that the receivers appointed by the Georgia Court be decreed to turn over and surrender to him the possession of all said property. The United States Circuit Court of Appeals for the 5th District, reviewing the case, says:

> "The Bankruptcy Act does not render inapplicable to a question raised as to what court is entitled to administer property of a bankrupt the rule that the court which first obtains rightful jurisdiction over a subject-matter is not to be interfered with by any other court, but only modifies that rule by making it inapplicable in certain instances where a court, other than the one in which a bankruptcy proceeding is instituted first assumed jurisdiction within a specified time before the institution of the bankruptcy proceedings. The general rule prevails to prevent any interference even by a court of bankruptcy with another court's control over property which rightfully has been subjected to its jurisdiction, if that jurisdiction attached more than four months before the petition in bankruptcy was filed. Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. It is not 'all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent,' which, under the provisions of section 67 of the Bankruptcy Act, are to be

> deemed null and void, but only such levies, judgments, etc., so obtained 'at any time within four months prior to the filing of a petition in bankruptcy.' Where a valid judicial lien or levy has been secured or made four months or more prior to the bankruptcy, proceedings to enforce the same may be prosecuted to the end. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; In re Koslowski (D. C.) 153 Fed. 823."

One other question remains for our consideration, namely: the effect of the order entered July 14, 1922, by consent of the parties. Appellants claim that this was the result of an agreement entered into between the appellee and the Jordan Valley Irrigation District. Such was not the case. That agreement was only incidental to the entire matter. The appellants had come down to Portland and filed their petitions in the case at bar, asking that the receiver be required to turn over the assets to the trustees respectively, and the appellants also answered the petition of the receiver for allowances for his compensation and expenses, and this matter came on for hearing upon all of the petitions and answers, all the parties being before the Court, as recited in the order of July 14th (Record p. 78), and the matter actually came on for hearing and was heard as shown by the Court's order, and the Court found and so states in the order that an agreement had been reached, not between the receiver and the irrigation district, but "the *parties* (Jordan Valley Irrigation District was not a party) having reached an agreement thereon and the Court being fully advised by *agreement*

of the parties, it is considered, ordered and adjudged, etc." By this order the Court fixed the compensation of the receiver and his counsel, as it undoubtedly had a right to do, and impressed these allowances as specific liens upon the properties in the hands of the receiver, and ordered and directed that the appellee pay these charges and be subrogated to the lien of the receiver therefor, and the appellee, in obedience to the order of the Court, did pay all of the said allowances. The order provided that the assets in the hands of the receiver should be turned over to the trustees in bankruptcy, only after the appellee had been reimbursed for the payment so made by it. The order of July 14th did not fix a time limit within which the appellee should be reimbursed for its advances on that behalf, but it must be presumed that such repayment would be made within a reasonable time. After more than three months had elapsed without anything having been done by the appellants, the appellee applied to the Court for an order of sale of the assets, and such order was entered, from which this appeal is taken. Prior to the entry of said order there was filed the petition of the appellant Wegener for an order vacating the order of July 14, 1922, and with this were filed certain affidavits (Record pp. 82-101), but we call the particular attention of the Court to the fact that no petition or motion was filed in the lower Court by the appellant Hoover for the vacation or modification of the order of July 14th, and we submit that under the authorities, before the appellant Hoover could seek a review by appeal to this Court it was necessary that he move in the lower court for a vacation of

the order of July 14th. It is true that he filed an affidavit in the Court below (Record p. 82), but this is neither a motion nor a petition for a modification or vacation of the order of July 14th.

It appears from the order of the Court that there was no motion or petition on the part of the appellant Hoover presented to the Court, nor considered at said hearing, but only the petition by the appellant Wegener. This court is therefore without jurisdiction to entertain the appeal of the appellant Hoover or to vacate or modify the order of July 14th, in so far as it affects said appellant Hoover and those whom he represents.

Both the appellants voluntarily submitted themselves to the jurisdiction of the Court long before the hearing on July 14, 1922, and on that day represented to the Court that they were there properly and with authority to act in the premises, and led the Court to believe that they had authority to act in the manner in which they did, and the appellate Court must presume that the Court below found that they had authority to make the agreement upon which the order of July 14th was entered. Now they come into Court and attempt to plead their own wrong and say that they acted without sufficient authority in consenting to the entry of the order, but there is nothing before this Court upon which the Court could find that they acted without authority. They either led or misled the Court on July 14th into the belief that they had adequate authority, and the only showing to the contrary consists in the

self-serving affidavits filed on October 30, 1922. We submit that the matter cannot be proven in that manner. If it was necessary for the trustees to have special authority to act as they did, that authority would have to come from an order of the referee in bankruptcy in the District Court for Idaho, and we submit that the records or lack of record of a Court cannot be proven by affidavits such as were filed by these appellants. If no order had been entered in the bankruptcy court, that fact should have been shown by the evidence of a proper officer of that Court, but no competent evidence whatever was submitted to the Court below to show a lack of authority on the part of the trustees.

In the case of Pacific Railroad against Ketchum, 101 U. S. 289, at page 296, the Court says:

> "A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the company assented through its solicitor. This is equivalent to a direct finding by the Court as a fact that the solicitor had authority to do what he did and binds us on an appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor or the officers of the corporation in such a matter is by an appropriate proceeding in the Court where the consent was received and acted on and in which proof may be taken and the facts ascertained. We take a case on appeal as it comes to us in the record and receive no new evidence.

Here the record states in terms that the company assented to all that has been done."

So in this case the record shows that the Court found that the parties had reached an agreement and proceeded to enter its order upon the agreement of the parties. This is equivalent to a finding that the counsel representing the parties had authority to enter the consent which the record shows, and such a finding on the part of the Court is not to be lightly disturbed without competent evidence to show the contrary. It certainly was not incumbent upon the District Court for Oregon in the midst of a hearing when it was represented to the Court that an agreement had been reached to halt the proceedings and wait for certified copies of bankruptcy orders from Idaho, before accepting the representations of counsel for the parties that they were acting properly.

The matter before the Court on July 14th presents an entirely different aspect from a case involving a claim by or against a bankrupt. It was not a case of compounding a claim against a debtor of the bankrupt or a claim of a creditor against the bankrupt. It involved a matter peculiarly within the jurisdiction and discretion of the District Court for Oregon, and that Court had a right to act in the manner in which it did act whether or not these appellants were in Court at the hearing and whether or not the appellants consented to the entry of the order, in view of the inherent power of the Court of equity to make allowances to its receiver and impress a lien upon the assets to secure payment thereof.

If, as a matter of fact, the trustees in bankruptcy transcended their unlawful authority in consenting to the decree and thereby the creditors of the bankrupt suffered injury, then the trustees and their bondsmen might have to respond to the creditors, but that would not affect the right of the Court of equity to see that its receiver was reimbursed. We submit that the appeal is without merit and should be dismissed.

BRONAUGH & BRONAUGH,
Attorneys for Appellee.

No. 3988

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. DALY,

Appellant,

vs.

C. W. LONG,

Appellee.

Transcript of the Record

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

CAPITAL NEWS PUBLISHING CO., BOISE.

No.....

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. DALY,

Appellant,

vs.

C. W. LONG,

Appellee.

Transcript of the Record

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

WILLIAM HEALY,
Boise, Idaho,
Solicitor for Appellant.

J. H. RICHARDS, and
OLIVER O. HAGA,
Boise, Idaho,
Solicitors for Appellee.

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AGREED STATEMENT.

No. 956.

In the above entitled cause, the plaintiff, J. W. Daly, having appealed to the Circuit Court of Appeals of the United States for the Ninth Circuit from the decree made, entered and filed herein on September 30, 1922, and the solicitors for the respective parties being of the opinion that the questions presented by the appellant can be determined by the appellate court without examination of all the pleadings and evidence, do hereby and with the approval of the Honorable Frank S. Dietrich, District Judge of the United States, of and for the District of Idaho, before whom the cause was tried and by whom the decree was signed, stipulate and agree that the following shall constitute a statement of the case and that the following statement shows how the questions arose and were decided in the district court, and that sufficient of the pleadings and of the facts as proved or sought to be proved as is essential to the decision of such questions by the appellate court, is included with this statement of the case:

That in July, 1921, the appellant herein, J. W. Daly, commenced, in the District Court of the Third Judicial District of the State of Idaho, an action against the respondent, C. W. Long, by filing a complaint therein, the material parts of which are as follows:

"*In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee.*

J. W. DALY, *Plaintiff,*
vs. COMPLAINT.
C. W. LONG, *Defendant,*

"Comes now the plaintiff and complaining of the defendant herein, alleges:

"That plaintiff now is, and for a long time hitherto has been, the owner and in the possession of those certain unpatented quartz lode mining claims situate on the northwesterly slope of Florida Mountain in Carson Mining District, Owyhee County, Idaho, and bounded and described as follows: (Here follows a particular description of the Daly, Globe, Payette, Orinoco, Snowflake and Grand Central lode mining claims and the Daly millsite.)

"That plaintiff is the owner of and has the exclusive title and right to possession, to the above described claims and premises as against all the world, except the United States, which has the legal title thereto.

"That the defendant claims an estate or interest in said mining claims and premises adverse to the plaintiff.

"That the claim of the said defendant is without

any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in said mining claims, land or premises, or any part thereof.

"WHEREFORE, THE PLAINTIFF PRAYS:

"1. That the defendant be required to set forth the nature of his claim; and that all adverse claims of the defendant may be determined by a decree of this Court.

"2. That by said decree it be decreed and adjudged that the defendant has no estate or interest whatever in or to said mining claims, land or premises; and that the title of plaintiff is good and valid and that the same be quieted in him.

"3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said mining claims, land and premises adverse to the plaintiff.

"4. Plaintiff further prays for his costs and disbursements in this behalf expended and for such other and further relief as shall seem meet and agreeable to equity."

That thereafter the cause was removed to the District Court of the United States for the District of Idaho, southern division, upon the application of the respondent Long, on the ground of diversity of citizenship.

That thereafter the appellee filed in the latter court an answer to the said complaint denying the material allegations thereof and interposing an affirmative defense or counter-claim, the material parts of which are as follows:

"Further answering the complaint, and for a defense of the whole thereof, and as a counterclaim to the cause of action therein alleged, this defendant alleges and shows:

"That on or about the 24th day of June, 1918, the said plaintiff, J. W. Daly, represented to this defendant that he was the owner of the mining claims and mining property described in the complaint herein, and the said plaintiff pretending to be desirious of developing said property and to interest this defendant therein, entered into a written agreement with this defendant, a full, true and correct copy of which is attached to the answer herein as Exhibit "A", and to which exhibit reference is hereby made for a full statement of the terms, provisions and conditions thereof.

"That said agreement was duly acknowledged by plaintiff and defendant before a notary public, as required by the laws of the State of Idaho, and the same was thereafter, to-wit, on the 25th day of July, 1918, by the said plaintiff, J. W. Daly, filed for record in the office of the County Recorder of Owyhee County, Idaho, and was duly recorded in

Book 4 of Bonds and Agreements on page 259 et seq. of the records of said county.

"That this defendant now is and ever since the execution of said agreement has been able, ready and willing to carry out all the terms and provisions thereof by him to be kept and performed, and has at various times incurred expenses and acquired tools and equipment for the purpose of doing and performing the work to be done and performed under said agreement; that such expenses have been incurred and such machinery, tools and equipment acquired in good faith and in reliance upon the said agreement between plaintiff and defendant, and for the purpose of carrying out the provisions thereof.

"That the said plaintiff has, during all of said period been a resident of the mining district in which said mining property is situated, and has resided on or in the vicinity of said mining claims, and has from time to time and repeatedly requested that the work to be done under said agreement (Exhibit "A") be postponed and delayed from time to time, and that the machinery or equipment thereby required for use in connection with such work be not purchased, but that the purchase thereof be postponed and deferred, and plaintiff has repeatedly claimed that he was not able to do his share of such work or to pay his share of the cost

of doing the same or his share of the cost of purchasing the equipment, tools and machinery required for doing such work, and by reason of his inability to do his share of such work or pay his part of such expenses, said plaintiff has urged and requested the postponements and delays above referred to, and said plaintiff has further from time to time urged that it was inopportune because of climatic conditions or financial or other local conditions to do the work at the times and in the manner contemplated by said agreement, and has urged and claimed that it would be to the best interest of all parties to defer and delay for the time being the doing of the work and the carrying out of the terms and provisions of said agreement.

"That this defendant has repeatedly informed plaintiff of this defendant's willingness, desire and ability to proceed in accordance with the terms of said agreement to develop said property and to do the work contemplated by said agreement and to otherwise carry out the terms and provisions of said agreement, and this defendant alleges and shows that any defaults, delays or failure to carry out all the terms and provisions of said agreement by this defendant to be kept and performed are due wholly to the urgent requests of said plaintiff as aforesaid and to the delays and failures of said plaintiff to carry out his part of said agreement.

"That it would be most inequitable and unjust to this defendant for the said plaintiff now to be permitted to cancel or annul said agreement or to take advantage of any of the pretended delays or failure of this defendant to carry out any of the provisions of said agreement according to the terms thereof.

"WHEREFORE, this defendant, having fully answered plaintiff's complaints, prays:

"1. That plaintiff's bill of complaint be dismissed, and that plaintiff take nothing thereby.

2. That it be adjudged and decreed that the said agreement (Exhibit "A") attached to this defendant's answer is a valid and existing agreement and in force and effect, and that this defendant has and is entitled to have an undivided one-half interest in and to the said mining claims and mining property under and pursuant to the terms and provisions of said agreement as modified at the instance and request of said plaintiff as aforesaid."

That attached to said answer and counter claim and marked Exhibit "A" is the following copy of agreement:

AGREEMENT

"WHEREAS, J. W. DALY, a bachelor, is the owner of the certain Six (6) unpatented, contiguous and duly recorded mining claims and attend-

ant Mill Site, all located in the Carson Mining District as situated near Silver City, in Owyhee County, Idaho, and described as follows, to-wit: the Globe Quartz Claim, the Payette Quartz Claim, and the Daly Quartz Claim, all as relocated by James T. Daly and John W. Daly, and as now held by John W. Daly, together with the Snowflake Quartz Claim, as deeded to the said James T. Daly and John W. Daly by J. J. Connor and George R. Hazel, and now owned by the said John W. Daly, together with the Grand Central Quartz Claim, a fraction as located by the said John W. Daly, and the Orinoco Quartz Claim, a fraction as located by John W. Daly and O. B. Brunbaugh, and now owned by John W. Daly, the above six claims being known as the Globe and Daly Group, together with the duly recorded Daly Mill Site, which site joins said group at the northerly end of the aforesaid Globe Quartz Claim and contains five acres of ground, together with the equipment thereon, and

"WHEREAS, one certain C. W. LONG desires to acquire an undivided one-half interest therein, all under the terms and conditions hereinafter designated, and

"WHEREAS, the above named Daly has agreed to transfer unto the said Long an undivided one-half interest in and to the properties and equipment above described and referred to, all under the terms and conditions hereinafter designated,

and for the consideration hereinafter set out, it is hereby specifically agreed as follows:

"That for the consideration hereinafter named and under the conditions hereinafter designated. the said Daly agrees to sell and deliver an undivided one-half interest in and to the properties and equipment above described and referred to unto the said Long.

"IT IS FURTHER agreed that both parties hereto will work together in developing and opening up the above described properties as soon as the said Long can begin such work conveniently, it being agreed that said Long will begin such work not later than October 1st, 1918, provided that in the event of unforeseen and unavoidable contingencies, the said Long shall have until October 1st, 1919, to begin such work with said Daly in so developing and opening up said properties. It is further agreed at this time that the work and services and the furnishing of equipment, supplies, material, etc., by the said Long as hereinafter designated, shall be deemed and considered by both parties as the consideration for such transfer unto the said Long by the said Daly of such undivided one-half interest.

"IT IS FURTHER AGREED that the fiscal year for doing such work in the developing and opening up of said properties shall begin on the 1st day of October of each year with the above res-

ervations as to unforeseen and unavoidable contingencies, and it is further agreed that at least six months of such work in so developing and opening up said properties shall be by said parties done during each such fiscal year.

"IT IS FURTHER AGREED by the said Daly that in the present main tunnel of said properties is now located a shaft or winz fifty feet deep and it is further agreed by the parties hereto that this said shaft shall be sunk fifty feet so as to make a level at a distance of one hundred feet below the present main tunnel, that at this one hundred foot level a tunnel shall be cross-cut to the vein, that said parties shall drift upon this vein for fifty feet each way from such cross-cut, that said shaft or winz shall then be sunk another one hundred feet and another cross-cut shall be run from such point to the vein, said vein there to be drifted fifty feet each way from said cross-cut.

"IT IS FURTHER AGREED that the parties hereunto shall each do or cause to be done one-half of the labor above referred to and each of said parties shall pay one-half of all costs for material, tools, machinery, equipment and supplies necessary to properly perform said work of developing and opening up said properties.

"IT IS FURTHER AGREED that if either party to this contract shall fail or refuse to perform the

work or cause said work to be performed or fail or refuse to furnish the matters and things by him agreed to be furnished, all as in the foregoing paragraphs provided specifically and as designated in this contract, then the other party shall have the right to so furnish and do, and said party so failing to furnish or do, as the case may be, shall repay said party so furnishing and doing the reasonable and proper price for such party.

"IT IS FURTHER AGREED that any ore of sufficient value shall be disposed of in such manner as shall seem most advantageous to both parties and the net receipts therefor shall be credited one-half to each of the parties hereto.

"IT IS FURTHER AGREED that if either of the parties hereunto shall be inducted into, or shall enlist in, the service of the United States for the purpose of assisting in the carrying on of the present war, that the privileges of this contract shall be suspended if the party so inducted or enlisted shall so desire, such suspension to last until both parties are out of the service of the United States.

"Provided, that if the party not inducted into or enlisted with the United States shall so desire, he may proceed with such work and the party in the service of the United States shall so soon as his service is ended and within a reasonable time thereafter, reimburse such other party for such ex-

pense and labor as said party shall have incurred in doing such work.

"IT IS FURTHER AGREED by the said Daly that he has a good right to sell and dispose of said properties at this time, that in the event any of the locations are defective he will at once remedy such defect and this contract shall be deemed and considered in full force and effect as to such remedies and corrected location, and said Daly further agrees that he has a good right to sell and assign said undivided one-half interest in and to the properties and equipment above described and referred to.

"IT IS FURTHER AGREED that the parties shall each be entitled to an half interest in and to all personal property, tools, and equipment by said parties accumulated in working and developing said properties under the terms and conditions of this contract and agreement.

"IT IS FURTHER AGREED between the parties hereto that said Daly has this day made unto the said Long his deed to the undivided one-half interest herein referred to, which said deed shall be placed in escrow, together with a copy of this contract, with the 1st Natl. Bank at Baker in the State of Oregon.

"IT IS FURTHER AGREED by the said Daly that in the event any of the descriptions or refer-

ences contained in said deed are found to be deficient or defective, the said Daly will make a proper deed correcting the same at such time as such corrected deed shall be demanded and required in order to fulfill the terms of this present contract.

"IT IS FURTHER AGREEED that the parties hereunto may at any time during the life of this contract change any one or more of the terms and conditions thereof by mutual agreement, and it is further agreed that any change or changes by said parties so made shall be in full force and effect after made and agreed upon, but such change or changes shall in no wise effect the remaining portion or portions of said contract by said parties left unchanged.

"IT IS FURTHER AGREED between the parties hereunto that if the said Long shall, after proper demand by said Daly, default in any one or more of the provisions of this contract by him hereby agreed to be observed and performed, any and all rights which the said Long shall have in and to the properties herein referred to, either under the terms of this contract or otherwise, shall at once cease and be of no effect and the rights of the said Long in and to said properties under the terms of this contract or otherwise shall be deemed null and void absolutely and in that event it is further agreed that the said Daly may and he shall have the right to demand and receive from said Bank said deed.

It is further agreed in the event the said Long shall default under this contract that any and all rights which he may have for work and services performed and material, supplies, etc., furnished, all under the terms of this contract, shall be null and void and of no effect and the said Long shall have from that time on no claim against the said Daly or against said properties.

"IT IS FURTHER AGREED that if the said Long shall carry out and observe the terms and conditions of this contract, all in the manner and to the extent as therein provided by him to be observed and performed, as the said contract shall be in its present form or in any form or change which the same may hereafter take by mutual agreement of the parties, then in either of said events the said Long shall have the right to demand and receive and hold the said deed to the undivided one-half interest as referred to in this contract, which said deed shall be by said Long taken and held as a full compliance by the said Daly with the terms of this contract.

"IN WITNESS WHEREOF, the parties above named have hereunto set their respective hands and seals on this, the 24th day of June, 1918.

WITNESSETH TO:

C. T. Goodwin	J. W. DALY	(Seal)
Iola Love	C. W. LONG	(Seal)

"State of Oregon,)
) ss.
County of Baker,)

"On the 24th day of June, 1918, personally came before me, a Notary Public, in and for the said County and State, the within named J. W. Daly, a bachelor, and C. W. Long to me personally known to be the identical persons described in, and who executed the within instrument and acknowledged to me that .....he..... executed the same freely and voluntarily for the uses and purposes therein named.

"IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal this the day and year last above written.

C. T. GODWIN,
Notary Public for Oregon.
My Commission expires Nov. 7, 1920."

C. T. GODWIN,
Notary Public
State of Oregon.

That thereafter the appellant filed a reply to said counter-claim denying the material allegations thereof, except the making, execution and recording of said agreement marked Exhibit "A", and interposing an affirmative defense thereto, the material parts of which are as follows:

"Further replying to said counter-claim of the defendant, and by way of affirmative defense, the plaintiff alleges:

"That on or about the 24th day of June, 1918, the plaintiff and the defendant made and entered into a contract in writing with reference to the mining claims and premises described in the complaint herein, title to which plaintiff seeks to quiet in himself as against this defendant. A full, true and correct copy of this contract and agreement is embodied in the answer and counter-claim of the defendant herein filed in this cause, and is marked Exhibit "A", and the plaintiff by reference to said pleading of the defendant incorporates said agreement into this reply.

"That by the terms of said agreement it was provided that the defendant Long should commence work on said mining claims and premises not later than October 1, 1918, provided that in the event of unforeseen and unavoidable contingencies, the said defendant should have until October 1, 1919, in which to begin such work on said properties, and that he should perform not less than six months' work on said properties during each year until the requirements of said contract should be complied with. It was further provided by the terms of said agreement that if the said defendant should default in the commencement or in the performance of such work, any and all rights which the said defendant might have in and to said mining properties by virtue of the terms of such contract should at once cease and be of no effect and the contract should

thereupon be deemed null and void. And it was further provided in said agreement that the performance of said work and services and the furnishing of equipment, supplies and materials by the said defendant should be deemed and considered by the parties as the consideration for the transfer unto the said defendant by the said plaintiff of an undivided one-half interest in and to said mining property and premises, and that such interest should be earned by the defendant and transferred to him by the plaintiff only upon the full performance by the defendant of the terms of said contract at the times and in the manner therein provided.

"That defendant has wholly failed, neglected and refused to carry out the terms and provisions of said agreement, or any of them, by him to be kept and performed; that he has neither provided equipment nor supplies nor has he performed any labor on the property described in said agreement, either in conjunction with the plaintiff or otherwise.

"That without fault on the part of plaintiff and without excuse on his own part, the defendant failed to commence work on said property on October 1, 1918, as agreed; that equally without fault on the part of plaintiff and without excuse on his own part, he failed to commence work on October 1, 1919; and that during neither of said years, or at any other time before or since, did he perform or attempt or tender performance of any labor on said

property; that he has defaulted in each and every provision of said agreement.

"That plaintiff has neither prevented performance of the terms of said agreement by the defendant nor waived his failure to perform, nor has plaintiff at any time been himself in default but has at all times been ready, willing and able to perform and has performed all the covenants and conditions thereof on his part.

"That after such default on the part of the defendant and before the commencement of this action, the plaintiff terminated and annulled said agreement as provided by the terms thereof and thereupon brought this action for the purpose of quieting his title as against the defendant.

"That having defaulted in all the provisions of said agreement, any and all rights which the defendant might have, or rightfully claim to have or acquire, in or to the property described in the complaint herein and in said agreement, thereupon terminated and ceased to exist.

'That the defendant wrongfully claims and asserts an interest in the property and premises described in the complaint herein under and by virtue of the terms of said agreement, but that said claims are without right and are injurious to the plaintiff. That said agreement, being of record casts a cloud on plaintiff's title to said property

and the claims defendant now asserts thereunder are wrongful and injurious to plaintiff. That plaintiff has no adequate remedy at law.

"WHEREFORE, the plaintiff, having fully replied to the counter-claim of the defendant, prays:

"1. That defendant's counter-claim be dismissed and that he have no relief thereby.

"2. That it be adjudged and decreed that the said agreement attached to the defendant's answer and counter-claim, (marked Exhibit "A") is void and of no effect, and that the defendant neither has nor is entitled to acquire, under or by virtue of said agreement, any interest in or to the mining claims and premises described in the complaint herein and in said agreement, and that the title of the plaintiff in and to said mining premises and property be quieted as against any claims of the defendant and that he be enjoined and restrained perpetually from asserting or claiming any interest in said property or right thereto by virtue of said agreement."

That each of the foregoing pleadings is duly verified.

That on the 12th day of September, 1922, the cause came on regularly to be tried before Honorable Frank S. Dietrich, District Judge of the United States, of and for the District of Idaho.

Thereupon the following proceedings were had, to-wit:

At the commencement of the trial the defendant conceded, and now concedes, that the plaintiff has title to the mining properties involved in the suit, subject to the claim of the defendant to an interest in that property by virtue of the contract between the parties, a copy of which has been heretofore set out and marked Exhibit "A".

Thereupon the plaintiff introduced in evidence said contract, the copy of which is hereinbefore incorporated as Exhibit "A". It is stipulated that said contract was duly recorded, at the request of the plaintiff, in the office of the County Recorder of Owyhee County, Idaho, on July 25th, 1918, and is of record in Book 4 of Bonds and Agreements on Page 259 and following of the records of the said County.

Thereupon the plaintiff introduced in evidence the letters, of which the following are copies, constituting the correspondence between the plaintiff and the defendant relative to the aforesaid contract:

Silver City, Idaho, 7-12-18

Mr. J. W. Long, Baker City, Oreg.

Dear Friend:—I arrived in Silver City a few days ago. I have been busy chasing after horses on foot. I am going out on horse back in the morning. I have found that there are several air compressors idle. I have not had

time to find out if we could get any of them to use. I have been in the tunnel it would not take very much work to clean it out. I am enclosing a post card picture of Silver City. It will perhaps look natural, and put you in mind of old times. I am sending you an average sample of ore from the drift in the Winze. The man I loaned that mining book to is out of town on a summer vacation. That contract has not been sent here yet to be recorded. Write soon.

Very Truly Yours, J. W. Daly,

Baker, Oregon, 8-1-1918.

Mr. J. W. Daly, Silver City, Idaho.

Dear Sir & Friend:—Received your letter of the 12th in due time. I have been busy, been out of town 2 different trips since you were here. Haven't anything of importance to write, only I saw C. R. Barnard on a recent trip down Snake River, you know him, he makes his home in Nampa? He said there was a considerable amount of old electric wire at the old Delamar mill and there was 2 Allis Chalmers Air Compressors about 10x10 and they were junking that so it might pay you to look over the stuff, might be something we would want? B .F. Bennett Mgr. Old De Lamar Mill De Lamar, Ida. I sent your sample to Union Assay office, Salt Lake City, Utah, and you will receive a duplicate assay certificate in due time as I ordered 1 sent direct. I made inquiries about that mining contract so if it hasen't arrived yet and isn't Recorded you might have it held until you can send the number & page and date & etc. of those claims as they are located to C. T. Godwin Lawyer Baker, the fellow who drew up the contract and if he thinks it necessary he can insert it in the contract, and when it is put on record we will not have an extra ex-

pense attached. I spoke to him about it and he said it was mailed all right but it has been missent he said it might of been sent to Owyhee Post office instead of Silver City, Ida. However, it will show up later if it has not yet? I thank you very much for your card, very nice indeed. Say! I know one of those fellows who runs the Trade Dollar Mine and have meet the other fellow so I believe we can get to hook on to the Transformer at the Black Jack. Would like to hear how you found everything, let me know at once. Hoping you are getting along nicely would like to be up there now but am busy here soveling ore. The nights here for the last two have been hot. Will close for time hoping to hear soon, I am,

Very trust yours, C. W. Long.

Jordan Valley, Oregon, 8-11-18.

Mr. C. W. Long, Baker City, Ore.

Dear Friend:—Your letter of the 1st Inst. rec'd and contents fully noted. I have been here since the 25th of July. I am helping my consin J. C. Driscoll, put his hay up. I am also trying to get a lease on the creek which I mentioned to you before I left Baker. There is not any thing for sale at present around the Old DeLamar mine or mill. There is a deal on for that property. I spoke to Mr. Foster and Benson about hooking on to the Black Jack transformer. They told me it was a very small one, only large enough for their own use. I asked Mr. St. Clair about the machinery at the Potosi mine. He told me I would have to ask W. F. Sommercamp. He lives at Weiser, Ida. The Silver City mine shut down, and have taken all the track, and other machinery out of the tunnel. The Company has another mine bonded up above Boise where they are moving most of the

material and machinery. There was a dandy little air compressor that would just suit for our work. I may be able to get a small motor from them. The contract arrived in Silver a couple of days before I left. It was missent to Owyhee, Ore. It cost $3.00 to record it. I suppose Mr. St. Clair will send the Page number and date to Mr. C. F. Godwin. Mr. St. Clair is a very obliging man he will send you any information that you may desire in regard to those claims. I do not know when I will go back to Silver. The end of this job is not in site yet. I found everything all wright except for a little muck stuffed down in different places in the tunnel. I do not expect that sample to assay very much. I know C. R. Benrod he was here about 10 years ago. I wish you would write to Mr. Sommercamp about that hoist and small air compressor it is just about the right size for that tunnel. I mean it can be taken into the tunnel without much trouble. When you write again let me know if you got that lease on the crome ore. I have explained all for this time will gladly furnish any further information. Write soon with best regards to all enquiring friends.

Yours Very Truly, J. W. Daly.
(Address Jordan Valley, Ore, co. J. C. Driscoll.

Baker, Oregon, 11-21-1918.

Mr. John W. Daly, Silver City, Idaho.

Dear Sir & Friend:—I guess you have been wondering what has happened to me. I have been intending to write but have been waiting thinking I would have something of interest to write you. I got tied up in a property in the Mormon Basin country and could not get away to come up & work with you & the Draft business bothered me too but that part is all over

now, at least it looks that way. I don't know just what the property amounts to but it is a fair showing & is free gold. I waited thinking we would get started milling ore on a 3 stamp mill, so if you did not have anything special & did not want to work your property you might want to come over & work with us. But we haven't been able to get the mill started. However, I believe we will be able to start soon. Have you been working on your claims yet this fall? I did not write that fellow about the compressor outfit. Do you expect to work any this winter? Would like to hear from & know how you are getting along. I am leaving for the mine today, so you can writ me at Rye Valley, Oregon & I will write you when I hear from you. I am Very Truly Yours, C. W. Long.

Jordan Valley, Oregon, 12-13-18

Mr. C. W. Long, Rye Valley, Oregon.

Dear Sir & Friend:—Your letter of Nov. 21st just rec'd. I was very glad to hear from you, and to know that you had a lease on a property with such a fair showing (Success to you.) I did not do any work on my claims since I saw you in June. I was up there on the 1st of Nov. I have been here since July. I will leave shortly for Boise to have one of my fingers operated on for bone bruise. I can not promise you for sure when I will be able to go at heavy work. However as I have nothing particular in sight I may go down and see you sometime this winter. I do not expect to do any work on my property this winter.

Yours very truly, J. W. Daly.

2-10-19

Mr. Charles W. Long, Rye Valley, Oregon.

Dear Sir:—I drop you a line to let you know

of my whereabouts. I have been in Boise since the 30th of Dec. I have been laid up with a bruised tendon on one of my fingers since October. I was operated on the 4th of January. There is still an infection in my finger. The Dr. is figuring on an operation yet before it is possible for it to heal. There is a great deal of puss coming out of it. It may be several months before I will have the use of my left hand. We are having a very mild winter throughout southern Idaho this year. I do hope that you are making good in that lease. I like to hear of men making good money who take chances in mining. I visited my claims the first of November. My plans are not very satisfactory at present. I have been under a great expense since having to quit work. I do wish to be able to get work soon. I am very tired of loafing in Boise. I will close by wishing you the best possible success in your mining venture.

Yours very Truly, J. W. Daly.

Nampa, Idaho, 3-25-19.

Mr. C. W. Long, Rye Valley, Ore.

Dear Sir & Friend:—Your letter of the 18th Inst. rec'd and contents fully noted. I am very glad to hear that you are still taking out ore on the property which you are working. I had to make a special trip from Nampa to Boise to get the letter because it was registered. I left Boise on the 18th inst. It has been two weeks ago today since the Dr. took the bandage off my hand. It was bandaged on a splint for 65 days. I will always have a crippled finger. I can't close my fingers enough to grip anything. I am realy sorry but I cannot go to work for you. If I was able to I would be glad to do so. I have been trying to get a job paint-

ing. I do not know whether I will succeed or not. Nampa is sure on the boom. There are a great many buildings going up here. I could get work here at from $3.50 to $4.50 per day if I was able to use my hand. The middle finger next to the index finger is stiff and always will be. I will enclose the lease and bond agreement you sent me. I wish you continued success in all your leases.

Yours very truly, John W. Daly.

Baker, Oregon, 8-14-1919.

Mr. John W. Daly, Silver City, Idaho.

Dear Sir & Friend:—Wrote you some time ago to Nampa and your letter was returned to me & I wondered where you had gone & how you are getting along? Do you expect to work on the Mine this Fall? If you do let me know and I will send a man or we can get one over there or I will come over myself, providing I can get away. If you do not intend to work it would be a good idea to do some repairing, would it not? I want to make a trip over there as soon as I can get away to come. How are things looking in the District? How is your hand getting, can you use your hand to work? Do you think we could use a gasoline Hoist in the tunnel & could you haul it up from Murphy or could we hook on to the transformer at 'Black Jack Mine". Have they installed a larger transformer yet? I have a 6 H P. Fairbanks & Morse Hoist & we could hook on to the Hoist & not ship the engine. The Hoist is complete with 150 ft. 1 inch cable & there is a large bucket that we can get if we want it. That Compressor outfit we were talking about is it still over there and can we get it? & is there a motor there? Let me know just what you want to do? Hoping you are getting along

nicely. I am here in Baker for a while, would be glad to hear from at once I am

Very truly yours, C. W. Long.

Silver City, Idaho, 8-18-19.

Mr. C. W. Long, Baker, Oregon.

Dear Sir & Friend:—Your letter of the 14th Inst. received and was glad to hear from you. I should have written to you when I came here to do some work on the claims. Any body who has unpatented mining claims are exempt from doing the work until next year. I did not know that until after I had started to work. I have been doing the work in an upper tunnel. I have started to clean out the lower tunnel. It is in fairly good shape except one cave close to the winze. I made inquir's about the power line. I was told that we could not hook onto the Black Jack transformer house. I am pretty sure that we could work a gasoline hoist in the tunnel. There is good air, only 25 ft. from the winze is an air shaft I have been offered a job helping a couple of fellows do assessment work for the Rick Gulch Co. 11 claims. So far I have refused the offer, but I think that I will reconsider it, and go to work for them. I can sleep in my own cabin and every evening I can muck a few cars in my tunnel. My fingers have all limbered up except one. I am doing better than I expected. It is very dull here. The Florida Co. is sinking a shaft below the Dewey Tunnel level. I would like to know what day you are coming I would try and meet you. Yours very Truly, J. W. Daly.

Baker, Oregon, 9-19-1919.

Mr. John W. Daly, Silver City, Ida.

Dear Sir & Friend:—Received your letter of the 18th Aug. glad to hear from you and to

learn your hand is getting better. I should have written you sooner but did not know just how my affairs were going to turn out over here. What do you want to do about the claims this winter, do you want to work or not? If you do not it would suit me as far as can see at the present time without I can turn something and come over myself. In case it suits you not to work and let the claims go over except one as I understand will have to have the assessment work done on, as only 5 claims are exempt from doing work on. If you want to do the work, oh have done the work all ready let me know and I will send the amount also there is some for Recorders fees that is coming to you, so if it suits you to let them go over have it all fixed up and let me know & also give me something to show that these arrangements are all right and satisfactory and I will record it, also send bill over for my part of assessment work and I will pay you. I believe if we can arrange to put in some machinery to hoist & drill it will be best when we get started. Please let me know what you want to do by return mail. I have plenty to do over here if you don't want to work your claims expect to make a sale here most any time.

I am, Very truly yours, C. W. Long.

Silver City, Idaho, 9-26-19.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—Your letter of the 19th rec'd and glad to hear from you. I am still working on the Rich Gulch property. Will be through in a few days as they are only representing six claims this year. This property has a nice little air compressor and motor. It may never turn a wheel the shape things are in. You state in your letter that your affairs are

not in shape for to permit you to start to work on my claims this winter. I look at the proposition this way. If we have to install machinery, and especially electric machinery it would be a heavy expense for both of us. Would you consider the idea of incorporating the property? There is only one reason why I am so anxious to work the property at an early date, is the condition the tunnel is getting in. I have put in two months work on the claims this summer, and expect to put in two more months before the snow flies. I am driving a crosscut to tap a ledge at the intersection of a cross ledge a very likely place for an ore deposits. It is not a matter of assessment work with me. It is the object of developing pay ore. I will have about four hundred dollars when I get this money from Rich Gulch Co. The cross-cut is up near the apex of the mountain quite a ways from the cabin. You do not owe me any money for assessment or recorders fees. Let me hear from you again? I think I have mentioned everything of importance in this letter so I will close.

Yours Very Truly, John W. Daly.

Copy sent to Recorder's Office.

Baker, Oregon, 9-30-1919.

Mr. John W. Daly, Silver City, Idaho.

Care County Recorder Owyhee Co., Ida.

I am ready to fulfill my agreement with you and go ahead with the development work on the Daly Groupe of Quartz mining claims according to our agreement on file, County Recorders Office, providing you wish to commence work October 1st. You can put on a man and I will pay the bill. Will be over later on. Did you get my letter?

C. W. Long.

Silver City, Idaho, 10-13-19.

Mr. C. W. Long, Baker City, Oregon.

Dear Sir & Friend:—Your letter of the 30th of Sept. received last monday the 6th. I presume you think I am a queer fellow not to write. I am making a special trip to town to mail this letter. I was 44 days that I did not go to town. I wish I had been where I could have got an answer to your letter of Sept. 19th sooner. I did not put a man to work as you requested. I will give you an extension of time to carry out the agreement. I can't work this winter on these claims and keep up my end of the expense. Everything is very high. I am of the same opinion as you are in regard to working these claims. We should wait until we can install some kind of machinery. I have got the tunnel in fairly good shape except one cave close to the winze. In regard to the extension of the agreement. I will wait until we can meet if you cannot come up here. I will go to Baker in about six weeks. I would be looking for a winter job now but have got some grub I want to use.

Yours Very Truly, J. W. Daly.

Baker, Oregon, 2-3-1920.

Mr. John W. Daly, Nampa, Ida.

Dear Sir & Friend:—Replying to your letter 10-13-19. I have been out of Baker for some time. Just came back yesterday, have been working at the Highland Mine as timberman. I would like to hear from you by return mail and know whether or not you are working and if not would you want to work any more on the claims. Providing however we could do any thing there that is in the way of hand work and you think it advisable to go out and go to work. Please let me know all of the par-

ticulars, that is just what I would need to bring in the way of tools and bedding and what the probable cost of a grub stake, and where we would buy and etc. I have some time and would like to get busy. Hoping to hear from you by return mail I am with best wishes

Very truly yours, C. W. Long.

Please are they working at the Trade dollar and could a fellow get on there?

Jordan Valley, Oregon, 2-9-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—Your letter of the 2nd Inst received today. I went to Silver and was forwarded from there. It takes the mail two days to get here from Caldwell on account of the bad roads. I was wondering why you did not write an answer to those last two letters, I wrote you last fall. I thought you had gone from Baker to work somewhere. In regard to the claims, and in trying to start to work at this time of the year it is almost out of the question. There is a pile of snow on that mountain this winter. The tember's that are there are very poor a great many are culls. Things have not come my way since I entered into the agreement with you. I was handicaped last year on account of my hand. It cost me several hundred dollars. I have not much grip in that hand one finger is stiff. It is my left hand. I may have to get that finger amputated yet; It is always in the way when I am working. Now to be candid with you I don't believe that I will ever be able to carry out the terms of that agreement. By making this statement you may think that I have another deal on or something in view, but I have not. I have come to the conclusion that this proposition is too expensive for working men like us with

only our own limited capital behind us. Now if you will send me an itemized statement of how much money you have expended since we entered the agreement I will send it to you as soon as I hear from you. Don't let your imagination over ride your judgment like it did mine. If I should ever incorporate, and you should desire to become one of the initial members of the company you may have that privilege. I am pretty sure they are not putting on any men at the Trade dollar. They are working only a few men when the mill shut down in December. They were milling stull dirt. I hope this letter will appeal to you in the right kind of a business way. Hoping to hear from you soon.

Yours Very Truly, J. W. Daly.

Baker, Oregon, 2-18-1920.

Mr. John W. Daly, Silver City, Ida.

Dear Sir & Friend:—Your letter of the 9th inst. received in due time and contents carefully noted. I was very much surprised to learn the position you taken in regard to our agreement concerning the mining claims. I wrote you September 30th that I was ready to fulfill my agreement with you filing a copy of same in the office of Co. Recorder of Owyhee County instructing you to put on a man and proceed with the work & I would pay the bill. You write me saying you could not work this winter and keep up your part of the expenses & that you had some grub there, that you wanted to use up before coming out & that you would be in Baker in about six weeks. You stated in your letter dated 10-13-19 you would give me an extension of time to carry out my agreement, and in regard to the extension of the agreement I will wait until we meet if you can-

not come up here, so I waited for your coming but you did not show up in Baker. Now when I entered into this agreement I done so in good faith with object of helping develop same & my fai&th is unshaken and am of the opinion the claims are good & will develop into a paying mine. I am ready and willing to go ahead with my part of agreement. I was under the impression you did not care to as could not work on the claims this winter. I do not want to give my contract up. Now John I realize you have had hard luck and possibly you think best not to install machinery at the present time, which possibly would be the best, but this will not keep us from doing hand work and going right ahead and sink. Providing However you are not able to put up for your part of the expenses. I will help you so we will be able to get along some way and develop the claims. I am figuring on getting some money out of some Interests I have, and should I be able to do this I will buy what machinery we need to do this work, and you can pay your part later on. We can fix that part so you will not have to worry. I will not take any advantage of you, on the other hand I will do all I can to help you. I thought possibly we might be able to buy the Compressor outfit you was speaking of in Rich gulch or near your claims. Now don't think hard of me for how I am seeing things as I do. Have planned on doeing this work for some time and do not want to be dissappointed. Hoping to hear from you soon, and I will keep you posted as to what I am doeing, may want you to mill some ore for me later on. I am

Very truly yours, C. W. Long.

Jorday Valley, Oregon, 3-8-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—Your letter of Feb.

18th received yesterday. I was out of town for nearly three weeks just returned yesterday. I have always endeavored to answer your letters promptly. I was very much disappointwhen you failed to answer my letter last fall. I do not think that I stated for certain that I would go to Baker in six weeks. If my recollection is correct I stated that I may go to Baker in six weeks. I remember of promising you an extension of time. You would have to see the mine to under the true condition of things. I do not think that correspondence will ever bring our views in harmony. I know that when we meet we can come to some understanding. I have got some work here that I want to finish then, I expect to go up to Silver. I do not know exactly when that will be. I am sorry to say that I cannot go to Baker to work on your mill run. I suppose it is only a short job.

Yours Very Truly, J. W. Daly.

Baker, Oregon, 7-12-1920.

Mr. John W. Daly, Silver City, Ida.

Dear Sir & Friend:—Received your letter some time ago and intended coming up there over a month ago, but as yet cannot get away. Will be up before long. Am expecting to make a turn on some property here and want to get through with it and I will come up there. I can ship up a Hoist from here either to run by gasoline or electricity. I think it best to install a Jackhamer outfit and if you are not able to carry your part I will try and install the outfit so we can get started and you can pay for your part when you get able to take care of it. I look to make a deal anny time within the next 30 days & I will come at once. I have confidence in your property and intend to live up to my part of the agreement, and

I will help you to live up to your part. I will let you know later when I can be there. Hoping you are getting along nicely, I am with best wishes,

Very truly yours, C. W. Long.

Silver City, Idaho, 8-21-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—I just rec'd your letter of the 12th inst. I was kind expecting to hear from you. I have been here since the 7th June. I made a trip to Boise on the 3rd to get some grub. My mare died last winter so I have to carry my supplies on my back. I was looking at some used cars when I was in Boise. They ask too much for the old worn out cars. What a fellow ought to have is a sort of caterpillar or low geared truck that would climb at 50 per cent grade. I hope you make your deal soon. I think it would be a good idea not to ship a hoist until arrangements had been made for power. Then you would know exactly what kind of hoist to ship. They have changed management of the Florida Mt. Co. since I spoke for power. They might permit us to hook onto the Black Jack transformer. The tunnel is in as good shape as it was last year. I think two men would put it in good shape in three weeks or a month. If you are willing to put up my share of installing the machinery. I will require a written agreement when I shall pay my share. Now Charlie when you come too Silver don't talk about your business to any body. Either on the way or after you get to Silver. You do not have to make any enquiries of my whereabouts. You will arrive about 3 p. m. that will give you ample time to come up to the claims that evening. It will not be necessary for you to telephone. You may write but I

may not get the letter until after you arrive. I aim to go to town every saturday night. I am going to town today. I have been appointed one of the appraisers of the Gold Rock mining claims. They are settling the Dr. Sanders estate. Excuse this pencil writing. Wishing you the best of success with your deal.

I am Yours very Truly, J. W. Daly.

P. S. Pretend that you are seeking a lease on some other old mine that has been a producer.

Baker, Oregon, 9-27-1920.

Mr. John W. Daly, Silver City, Idaho.

Dear Sir & Friend:—Replying to your letter of July 21st will say I have waited on answering you on account of making a deal, but finances is in such a condition & prices being so high that people are holding off and are not taking hold of mining property and Presidential election being near all make it against selling mines. However, I am confident by early spring will be able to make a turn so we can go ahead and install a hoisting and jackhammer outfit on your claims. I have considered the proposition and should I make a turn or be able to get out a shipment of high grade ore which is possible and probable, I will install a power plant for hoisting & drilling and I will make you a present of a half interest in same. I don't believe we can accomplish very much until we can do this, do you? However, if you want to work there this winter go ahead and put on a man and hire him as reasonable as you can and start in October 1st and send in the bill to me at Baker and I will pay my part, according to my agreement with you, which is on record. Now in case you don't want to work there this winter let me know at

once just what you want to do about it and when the assessment work is finished you can come over to Baker and we can have a settlement. How much am I going to owe providing you are not going to stay there all winter? Now in case you want to come over I have a proposition figured out for us to work on providing we can get it? Providing we could would have a good chance to make some money this winter but would not want to start in until the latter part of December. There is a contract of driving a drift you could get, and could do this by day or contract, should you take it by day could get your grub furnished, could get this done before we would start in on the other proposition and your pay would be good and in the same part of the country where other proposition is located. Let me hear from you soon just what you are going to do. And case you don't want to work there you can give me an extension of time and I will file same. I would like to know just what you can buy that Air Compressor in Rich Gulch or near there for? and what size & etc. & also make? Maybe we could borrow it? Could you rustle a electric motor and could we borrow or if we had to buy what would same cost? Could we hook on to the Blackjack transformer, and do you know where we could get wire & etc. are they a Hoist there we could get & etc. Hoping to hear from you soon and let me have all the news of interest. Write me at Sparta, Oregon. I am with best wishes for you and yours,

I am, Very truly yours, C. W. Long.

Silver City, Idaho, 10-2-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—I received your registered letter of the 27th Ult. and contents fully

noted. I am real sorry that you were unable to make a deal. I think that in the near future that high prices will adjust themselves. Then there will be a greater demand for mining proprty. The demand for coinage since the war has increased. I have found out that we cannot connect on-to the Black-jack transformer. The Dewey tunnel is shut down since the middle of August. They are in debt about twenty Thousand dollars. They are being sued by the power company for ($2000.00). The De Lamar is also shut down. They are being sued for six thousand dollars. It is not a very good business policy to get in debt. I do not want to stay here this winter because I am not prepared to do the work I want to do. As to hireing a man I cannot work him to advantage. I am through with the assessment work for this year. But am still working in the lower tunnel so that it won't cave any more. I am enclosing a letter from my Mother of recent date. You can see by it that I need not be idle. I have been getting them kind of letters since the 1st of September. I consider that you do not owe me anything for assessment work. If we ever got started to do anything I would have that much coming to my credit. I do not want to grant you an extension of time on the present agreement. It will be time enough when you are ready to commence work. I will give my reason. Somebody might want an option a lease or a bond I could not give either if the property is tied up. The Rich Gulch Co. is going to start up next year so we could not get that air compressor. They company have taken all the idle machinery, and now they are not working. I could not think of going so far away to work when I can get all the work I can do in Malhure Co. Oregon. I expect to be here

until after election. Common labor is $6.00 per day here and skilled is 7 & $8.00 per day. Wishing you the best of success in all your deals.

I am Yours Very Truly, J. W. Daly.

Baker, Oregon, June 28, 1921.

John W. Daly, Esq., Silver City, Idaho.

Dear Sir:—Again I write you relative to our contract covering the Daly Group of Mining Claims near Silver City, Idaho. While at Silver City recently I discovered that you contracted your interests in this property to the Banner Mining & Milling Company. I do not know these people and will ask that you tell me how you have protected my interests in these properties. I have never at any time given up my interests, as you well know, so for this reason I want information with reference to the assessment work and as to when it will be possible to continue work in developing and improving the property. Trusting that I will hear from you in the immediate future, I remain,

Very Truly Yours, C. W. Long.

The plaintiff J. W. Daly was sworn as a witness on his own behalf, and identified the agreement, of which Exhibit "A" attached to the counterclaim of the defendant and heretofore incorporated is a copy. as the contract made between himself and the defendant C. W. Long relative to the mining property described in the complaint. He testified that the mining property therein described is located near Silver City in Owyhee County, Idaho, and that it has an elevation of about 7500 feet; that it is a prospect having no developed ore; that there is

some equipment on it, such as a track and car, but no power or power machinery installed.

He testified that following the making of the contract and until the time of the trial Long had done no work on the property and had not been on the property to the knowledge of the witness; that during the period of three or four years following the execution of the contract Long was in the vicinity of Baker City, Oregon; that the witness corresponded with Long during this period, and he identified the letters heretofore incorporated as the letters written by him to Long and received by him from Long; that in addition to this correspondence the witness had a telephone conversation with Long, but that beyond this correspondence and telephone conversation there had been no oral or written communications between them and no further contract or agreement; that the telephone conversation was in the fore part of February, 1920; that the witness was at that time in Jordan Valley, Oregon, and Long was in Baker City; that Long called the witness, and the substance of the telephone conversation was Long wanted to know if it would be feasible for himself and witness to go up and start working on the property in question at that time of the year, and witness told him no, he didn't think it would, that the mountain was covered with snow, and they couldn't get up there with a team with their supplies; that witness also had some written

correspondence with Long on the same subject about that time; that the statements of the witness to Long made at that time with reference to the snow on Florida Mountain were correct.

Witness further testified that when he received the letter from Mr. Long dated August 14, 1919, he quit the tunnel he was working in and went to work in the lower tunnel; that the lower tunnel is the tunnel specified in the contract with Long as the place where the work under the contract was to be done; that he went to cleaning this tunnel out and retimbered it as much as he could, to have it in good shape when Long got there; that witness was ready and able to go to work with Long should the latter have come on October 1, 1919, and that he would have gone to work on October 1st should Long have arrived.

Witness testified that when he received the letter from Lond dated July 12, 1920, he started in again to clean out the same tunnel; that the tunnel was considerably caved; that he was able to go to work with Mr. Long on the claims in question on October 1st, 1920 and was there on the ground at that time waiting for Long to come, and was ready to go to work at that time should Long have come.

Witness testified that Mr. Long had never sent any supplies, machinery or equipment to the property, and never purchased any to the knowledge of

witness; that Long never paid witness any money on account of assessment work, and never paid anything on account of labor done there, and had never done a day's work on the property or been on the property to the knowledge of witness; that witness had never prevented Long from going to work there.

On cross-examination Daly testified that in October, 1920, he was on the property waiting for Long to come and go to work; that he did not advise Mr. Long that he was there ready to go to work and express a desire that Long should come and work on the property at that time; that he remained on the property waiting for Mr. Long until the 12th or 15th of November, 1920; that he wasn't expecting Long after the first of October, but was expecting him on or about the first of October; that what led witness to believe that Long would be there on or about October first was that the agreement between witness and Long had stated that Long was to commence work on or about October first, 1920; that there was an extension; that witness gave Long an extension from 1919 to 1920; that he gave him a year's extension; that the extension was given in October, 1919, by letter, in one of the letters introduced in evidence; that witness had heard from Mr. Long previous to October first, 1920, stating that they had better not start to work that fall; that witness had no other correspondence with Long except those in evidence.

Witness was asked the following question: "In July, 1920, Mr. Daly, you wrote Mr. Long, in which you said: 'Now, Charlie, when you come to Silver don't talk about your business to anybody, either on the way or after you get to Silver. You do not have to make any inquiries of my whereabouts. You will arrive about 3 P. M. That will give you ample time to come up to the claims that evening. It will not be necessary for you to telephone. You may write but I may not get the letter until after you arrive.' Then you add a postscript: 'Pretend that you are seeking a lease on some other old mine that has been a producer.' What was the occasion for that?"

In reply the witness testified that Long had written that he would be up there, that he was coming, that he expected to be up there; that he had written that he might be up there; that he had not fixed any time or said definitely that he would be there; that the reason witness didn't want Long to say anything to anybody that he was coming to Daly's property was because the people would discourage Long, and witness wanted to protect Long against discouraging reports about the property.

Witness was asked to explain statements appearing in one or two of his letters saying that he hadn't received a reply to some letters written the previous fall. Witness answered that it was in 1919, the last two letters. He had anwsered them right close to-

gether and didn't receive any reply until February, 1920, and that wasn't a reply to those letters. He thought the reply was dated February third. Witness testified he wrote a letter October 13, 1919, and didn't get a reply until February 3, 1920; that he thought he wrote one other letter in October, 1919. Attention of witness was called to a letter written by him March 25, 1919, acknowledging receipt of a letter from Long dated March 18th, 1919. Witness testified he did not have the letter of March 18th, but with the exception of that letter he had produced all the letters received from Long.

Here the plaintiff rested his case.

The defendant C. W. Long, being sworn as a witness on his own behalf, testified that in the early part of February, 1920, he called the plaintiff, Daly, on the telephone. Witness put in the call from Baker City for Daly at Silver City and the latter answered the call at Jordan Valley, Oregon. Witness had written Daly concerning the contract on the mining claims and had not gotten a reply as soon as he thought he should, so he put in a telephone call. Witness could not recall all the particulars of the conversation but testified that he asked Daly about getting started to work on the claims. Daly told him it was out of the question, that there was a pile of snow on the mountain. Witness believes that in the conversation he mentioned about buying supplies in Baker, that is some groceries,

army supplies, for use in connection with the development of this property. Daly did not say anything with reference to the purchase of these supplies but insisted they couldn't start to work at that time of the year. Daly wrote witness a letter immediately after this conversation, about February 8th, 1920, and in this letter was something along the line of the telephone conversation. Nothing was said in the conversation about the time fixed in the contract having expired. The reason Daly gave for not going to work was the climatic condition. Daly said he didn't think they could get to work at that time of the year, that there was a pile of snow on the mountain.

Witness testified that at that time in 1920 he bought some canned army bacon, some prunes and canned jams for use in doing work on the claims, the bill for the same being Forty-four Dollars and something; that he still has most of this stuff; that some of it is at Murphy, Idaho; that he took it to Murphy to work on these claims; that the reason he didn't use it was because witness made a trip into Silver City and made inquiries about Mr. Daly, and the latter was out of town, and witness went to the recorder's office and discovered that Daly had made a contract on his mining property; that this was some time during May, 1921; that Daly had made this contract with the Banner Mining Company; that witness asked to see some records,

told the county recorder he was looking up the Daly property, and the recorder made the remark that the property had been bonded; so witness asked to see and the recorder produced the contract, a copy of the contract that was there in the recorder's office; that later on witness secured a certified copy of this contract, and to the best of his recollection the contract bore the date of the 6th of January, 1921.

Witness testified he did not see Daly that trip, that Daly was out of town; that witness understood he was at Jordan Valley; that witness made inquiries for Daly for the purpose of finding him.

Witness testified that he bought a gasoline engine and hoise for use on the Daly mining property in connection with carrying out the contract between himself and Daly; that this was in 1919, witness thinks during the fall of that year; that he has a receipt that will explain the date it was bought; that the occasion for buying this gasoline engine and hoist was that they needed a hoist in the tunnel to do the work called for in the contract; that Daly had written witness they could use a gasoline hoist in the work there; that witness believes Daly made mention of it in some of his letters; that it was upon that suggestion or statement of Daly's that witness bought this engine and hoist; that ever since this contract was entered into witness

has been able to fulfill his part of the contract, able to go ahead and carry out the work.

On cross-examination the witness stated that some years ago he worked at the Trade Dollar Mine in Silver City; that on that occasion he went in in the early spring and was there during the summer; that witness was aware at the time he made the contract that Silver City was a mountainous country and a high altitude, and knew the winters were severe there and the snow deep, particularly in February; that he bought groceries and supplies in February, 1920, to bring in at that time; that he didn't take these supplies in until the spring of 1921; that he bought some army goods, canned bacon, prunes and canned jams, the principal part of it; that he bought them in February, 1920, to take into Silver City to start work on the Daly property; that that was witness' intentions; that witness still has most of the stuff; that witness is generally busy doing something most of the time; that he buys supplies at times; that this was the first opportunity he had of buying army supplies; that he started with the supplies to Silver City in the spring of 1921, the witness thinks it was during May; that from Silver City witness went to Boise; then he was in Nampa and in Boise again, and then went back to Baker; that after he went back to Baker he wrote the letter of June 28, 1921, to Daly.

Witness testified that on that trip into Silver City he just stayed one night and then come out; that he hadn't written to Mr. Daly since the previous September; that he didn't write Daly on the occasion of his going in to Silver City.

Witness was asked the following questions and made answer as follows:

"Question: You had heard some weeks before that some ore had been found in the Daly property, had you not?

"Answer: Well I had heard they was working at Silver.

"Q. You had heard about ore being struck in the Daly property or very close to it, han't you?

"A. Well, I had heard some talk of it.

"Q. Isn't that fact, that you had heard about some good ore being struck in the Daly group, or very close to it, what induced you to go to Silver City in May or June, 1921?

"A. Well, I went because I wanted to fulfill my contract.

"The Court: No. Answer the question. Read him the question (Question read).

"Answer: No, sir, it isn't."

Witness testified that this trip was the first one he had made to Silver City since the contract with

Daly was made in June, 1918; that witness bought this gasoline engine and hoist in Baker, Oregon; that he bought it to use in mining; that he bought it to use in Silver City if he wanted to use it there; that when he bought it he was working on the highway; that he did not ship it to Silver City; that the hoist and engine have not been moved from the place it was when witness bought them; that it stands just like it was when he made the deal; that he could not recall whether he bought it before or after he wrote the letter of September 19, 1919.

Witness testified that in many subsequent letters he spoke of installing a jackhammer outfit; that a jackhammer outfit consists of motive power, an air compressor and connecting pipes and a jackhammer and connecting hose; that it does not necessarily entail use of transformers; that a gas driven air compressor can be used; that in numerous subsequent letters witness spoke of hooking on to the Black Jack transformers; that witness had no other place to use the hoist and engine at the time he bought them; that he was working on the highway for wages at the time; that he worked for wages during the ensuing winter for the Highland mine.

Witness testified that he had not been in Silver City since May or June, 1921. Asked whether he had ever been prevented by Daly from working on the claims, he testified that in the letters introduced

in evidence and in his telephone conversation of February, 1920, he had tried to get the work started; that he had no way of telling there was lots of snow on Florida Mountain in February, 1920.

On redirect examination he testified that he had written one letter to Daly which was not delivered; that this letter was addressed to Daly at a place where Daly said he would get his mail; that this letter was returned to witness; that this is the letter referred to in one of the letters introduced as having been mailed to Nampa and returned; that is the only letter which witness can recall that was not delivered.

Here the defendant rested.

From the foregoing facts the District Court of the United States for the District of Idaho, Southern Division, on the 29th of September, 1922, made the following decision:

"DIETRICH, DISTRICT JUDGE:

"It must be admitted that the contract pleaded by the defendant in this case is inartistically drawn, and, in almost any view that can be taken of it, improvident for the plaintiff. It is further seriously doubted whether, in a suit by the defendant for its specific performance, a court of equity would grant him relief. But, unless we find that the defendant has forfeited such rights as he may have, the plaintiff is in effect asking a court of

equity to nullify the contract, notwithstanding the fact that he was competent to make it and did in fact voluntarily enter into it. While a court might for various reasons be unwilling, at the instance of one party, specifically to enforce an agreement, it does not follow that at the instance of the other party it should declare the agreement void.

It is therefore thought that we can in this suit consider but a single question, and that is, whether or not the defendant has forfeited such rights as the contract purports to confer upon him. It is a familiar principle that forfeitures are not favored in law, and upon the whole I am unable to find from the evidence in this case that the defendant is chargeable with such default as would constitute a forfeiture. It must be borne in mind that the work contemplated by the agreement was to be done at the expense of both parties; both of them were to share equally in the burden of it. And hence anything the defendant might do in carrying it forward would impose a burden upon the plaintiff as well. To say the least, the conduct and attitude of the plaintiff in respect to proceeding with the project were equivocal. There is no clear expression of a desire upon his part that the defendant go ahead, and thus incur expenses which both parties must, under the terms of the agreement, share. The plaintiff doubtless came to feel that the contract was improvident on his part. At times

he made it clear that he did not feel financially able to contribute, and hence was unwilling that anything be done. It may very well be that the defendant was in doubt as to his wishes, and it may further very well be that he unequivocally expressed a desire that the contract plan be carried out, the defendant would have met the demand. Upon the whole, I do not feel warranted in finding that the defendant forfeited his rights. Accordingly a decree of dismissal will be entered. Each party will pay his own costs."

Thereafter on September 30th, 1922, said Court made and entered the Decree from which this appeal is taken.

The solicitors for the respective parties hereto submit the foregoing as the agreed statement of the case upon which this cause shall be presented to the Circuit Court of Appeals for the Ninth Circuit for the approval of the Honorable Frank S. Dietrich, District Judge of the United States for the District of Idaho. But the solicitors for appellees reserve the right, in the event it shall become necessary for a proper determination of the questions raised on appeal by appellant, to make a part of this record such other and additional part of the record in the District Court and evidence on the trial, not included in this agreed statement, as may be material to a determination of the question so raised on appeal, and the expense of certifying and

printing such additional part of the record shall be borne in the first instance by appellant.

WILLIAM HEALY,
Solicitor for Plaintiff and Appellant.
Residence, Boise, Idaho.

RICHARDS & HAGA,
Solicitod for Defendant and Appellee.
Residence, Boise, Idaho.

The foregoing agreed statement of the case is hereby approved in accordance with the provisions of Equity Rule 77.

Dated this 2nd day of February, 1923.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DECREE.

This cause came on to be heard at this term, and was argued by councel; and thereupon upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED as follows, viz:

That the defendant, C. W. Long, has not forfeited any rights or interest acquired by him in and to the mining claims, premises and property described in the bill of complaint herein, under the

agreement between plaintiff and defendant dated June 24, 1918, and recorded in the office of the County Recorder of Owyhee County, Idaho, in Book 4 of Bonds and Agreements on page 259.

That plaintiff's bill of complaint for a decree quieting his title to said premises and property be and the same hereby is dismissed, each party to pay his own costs.

Dated this 30th day of September, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Sept. 30, 1922.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above named defendant, J. W. Daly, conceiving himself aggrieved by the decree made and entered on September 30th, 1922, in the above cause, does hereby appeal from said decree and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal be allowed and the transcript of the record, proceedings and papers upon which said decree was made, duly authenticated,

may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WM. HEALY,
Solicitor for Plaintiff.
Residence, Boise, Idaho.

Service of the foregoing petition and appeal and receipt of a copy thereof admitted this 2nd day of February, 1923, together with notice of the allowances of said appeal.

RICHARDS & HAGA,
Solicitor for Defendant.
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923,
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the plaintiff and appellant, J. W. Daly, by William Healy, Esq., his solicitor, and says that the decree entered in the above cause on September 30th, 1922, is erroneous and unjust to this appellant, and that in the records and proceedings in the above cause there is manifest error in this, to-wit:

I.

The Court erred in holding as a matter of law that the plaintiff was not entitled to a decree quieting his title to the premises described in the com-

plaint, and in dismissing the plaintiff's bill of complaint.

II.

The Court erred in holding as a matter of law that the plaintiff waived performance on the part of the defendant of the terms of the contract between the parties concerning the development of the property in controversy.

III.

The Court erred in adjudging and decreeing that the defendant has not forfeited any rights or interest in and to the mining premises described in the bill of complaint under the agreement between the parties.

IV.

The Court erred in holding as a matter of law that the defendant acquired any right or interest in the property by virtue of the agreement between the parties.

V.

The Court erred in holding as a matter of law that the agreement between the parties is a subsisting contract, and that it had not expired in accordance with its own terms.

VI.

The Court erred in holding as a matter of law that the agreement between the parties as a com-

plete and valid agreement capable of being enforced by either part.

VII.

The Court erred in holding as a matter of law that the existing agreement between the parties affords any defense to the appellant's action to quiet his title.

WM. HEALY,
Solicitor for Plaintiff and Appellant.
Residence, Boise, Idaho.

Service of the foregoing assignment of errors and receipt of a copy thereof hereby acknowledged this 2nd day of February, 1923.

RICHARDS & HAGA,
Solicitors for Defendant and Respondent.
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

This day came J. W. Daly, plaintiff above named, and presented his petition for an appeal and an assignment of errors accompanying the same, which petition, being considered by the Court, is hereby allowed, and the Court allows an appeal to the United States Circuit Court of Appeals for the

Ninth Circuit on the filing of a bond in the sum of One Hundred Dollars with good and sufficient security, to be approved by the Court.

Dated this 2nd day of February, 1923.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That E. G. Elliott and J. R. Smead, being bona fide residents and free holders of Ada County, Idaho, acknowledge themselves to be indebted to C. W. Long, appellee in the above cause, in the sum of One Hundred Dollars, conditioned that whereas, in the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in that Court wherein J. W. Daly was complainant and C. W. Long was the defendant, on September 30th, 1922, a decree was rendered and entered against the said J. W. Daly, and said J. W. Daly has obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation having been directed to the said C. W. Long

citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, on the 3rd day of March, 1923;

Now, therefore, if the said J. W. Daly shall prosecute his said appeal to effect and answer all costs, if he shall make good his plea, then the above obligation shall be void, otherwise to remain in full force and virtue.

J. R. SMEAD,
E. G. ELLIOTT,

STATE OF IDAHO,)
) ss.
COUNTY OF ADA,)

J. R. Smead and E. G. Elliott being first duly sworn, upon oath for himself, and not one for the other, deposes and says: That he is a bona fide resident and free holder of Ada County, Idaho, and that he is worth the sum specified in the foregoing bond as the penalty thereof over and above all his just debts and liabilities in property exclusive of property exempt for execution.

J. R. SMEAD,
E. G. ELLIOTT.

Subscribed and sworn to before me this 2nd day of February, 1923.

(SEAL) CLINTON H. HARTSON,
Notary Public for Idaho.
Residence, Boise, Idaho.

My commission expires Feb. 6, 1927.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

STIPULATION RELATIVE TO RECORD ON APPEAL.

It is hereby stipulated by and between J. W. Daly, complainant and appellant, and C. W. Long, defendant and respondent, through their respective solicitors, that in order to save expenses in the printing and certification of the record and to avoid encumbering the record with papers and proceedings not pertinent to the consideration of the appeal, the following portions of the record and no more shall be transcribed, certified and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, by the clerk of the United States District Court for the District of Idaho, under the appeal taken by the said appellant herein, and shall be included in the printed record of the said appeal, to-wit:

1. Agreed statement of the case under Equity Rule 77.

2. The decree of the court from which the appeal is taken.

3. All papers filed for perfecting the appeal.
   a. Petition for Appeal.

b. Assignment of Errors.
c. Order Allowing Appeal.
d. Bond on Appeal.
e. Citations and all orders made in connection therewith and all admissions or returns of service of any of the said papers.

4. This stipulation.

The solicitors for appellee reserve the right, in the event it shall hereafter become necessary for a proper determination of the quetions raised on appeal by appellant, to make a part of the record on appeal such other and additional part of the record in the District Court and evidence on the trial, not included in the agreed statement of the case above mentioned, as may be material to a determination of the question so raised on appeal.

Dated Feb. 2, 1923.

WM. HEALY,
Solicitor for Plaintiff and Appellant.
Residence, Boise, Idaho.

RICHARDS & HAGA,
Solicitors for Defendant and Appellee.
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PRAECIPE TO CLERK FOR TRANSCRIPT ON APPEAL.

To the Clerk of said Court:

Pursuant to the stipulation of the parties filed herein, you will please incorporate the following portions of the record in the above entitled cause into the transcript on the appeal in said cause to the United States Circuit Court of Appeals, to-wit:

1. Agreed statement of the case under Equity Rule 77.
2. The decree from which the appeal is taken.
3. All papers filed for perfecting the appeal.
   a. Petition for appeal.
   b. Assignment of Errors.
   c. Order Allowing Appeal.
   d. Bond on Appeal.
   e. Citation and all orders made in connection therewith and all admissions or returns of service of any of the said papers.
4. Stipulation as to Record on Appeal.
5. This Praecipe.

WM. HEALY,
Solicitor for Plaintiff and Appellant.
Residence, Boise, Idaho.

Service of the foregoing praecipe and receipt of a copy of the same thereof admitted this 2nd day of February, 1923.

RICHARDS & HAGA,
Solicitors for Defendant and Respondent.
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CITATION.

United States of America to the defendant and appellee above named, C. W. Long, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Idaho, Southern Division, wherein J. W. Daly was complainant, and C. W. Long was defendant, an appeal has been allowed the said complainant J. W. Daly herein, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said Court at San Francisco, State of California, thirty days after the date of this citation to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Frank S. Dietrich, District Judge of the United States Court for the District of Idaho, this 2nd day of February, 1923.

FRANK S. DIETRICH,
(SEAL) *United States District Judge.*

Attest, W. D. McREYNOLDS, Clerk.

Service of the above and foregoing citation, together with receipt of a copy thereof, is admitted this 2nd day of February, 1923.

RICHARDS & HAGA,
Solicitors for Defendant and Appellee.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I. W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 71, inclusive, to be true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $82.80 and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 26th day of February, 1923.

W. D. McREYNOLDS,

(SEAL) *Clerk.*

No. 3988

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. DALY, *Appellant,*

vs.

C. W. LONG, *Appellee.*

BRIEF OF APPELLANT

On Appeal from United States District Court for the District of Idaho, Southern Division

WILLIAM HEALY,
Solicitor for Appellant.

Filed....., *1923*

....., *Clerk.*

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

No. 3988

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. DALY, *Appellant,*

vs.

C. W. LONG, *Appellee.*

BRIEF OF APPELLANT

On Appeal from United States District Court for the District of Idaho, Southern Division

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WILLIAM HEALY,
Solicitor for Appellant.

Filed..... ....., *1923*

....., *Clerk.*

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. DALY, *Appellant,*

VS.

C. W. LONG, *Appellee.*

BRIEF OF APPELLANT

On Appeal from United States District Court for the District of Idaho, Southern Division

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STATEMENT OF THE CASE

This action was brought by the plaintiff, J. W. Daly —appellant here—to quiet his title as against the defendant in five unpatented quartz mining claims and an attendant mill site, located near Silver City, in Owyhee County, Idaho. The title of the plaintiff is conceded to be good, except as it may be affected by a contract entered into between the parties (Trans. p. 26) which contract appears in the agreed statement of the case.

The plaintiff Daly lives near Silver City. The defendant and appellee, Long, lives near Baker City, Oregon. Both men are in the class of ordinary prospectors and miners, without considerable financial resources.

On June 24, 1918, Daly and Long entered into a written contract, executed at Baker City, under which it was contemplated that Long would acquire a half interest in the Daly ground (Trans. pp. 13-21). An examination of the terms of this contract is important at this point. After reciting the ownership of the ground by appellant, the agreement avers that Long desires to acquire a half interest therein. The consideration for the half interest to be acquired by Long is the performance by him of certain labor and services in sinking a shaft and in running two cross cut tunnels from the shaft to the vein and in drifting on the vein from these cross-cuts. Daly and Long are each to do or cause to be done one-half of the necessary labor. It is stipulated that Long shall begin such work not later than October 1, 1918, provided that in the event of unforeseen contingencies Long shall have until October 1, 1919, to begin such work. It is agreed that the labor to be done by Long and his incidental furnishing of equipment and supplies shall be deemed the consideration for the half interest to be acquired by him, and it is also provided that the interest shall not be transferred until the contract has been performed by Long, the deed to be placed in escrow. The parties agree that the "fiscal" year for the prescribed development of the property shall begin October 1 of

each year and that at least six months work shall be done during each such year.

It is plain that the parties intended that Long should acquire no interest in the property until the performance of his contract, and the time within which he must commence performance is clearly set forth. In the event Long should default in any one or more of the provisions of the contract by him agreed to be observed, it is provided, in substance and effect, that his rights under the contract shall at once terminate. While Daly is bound to perform one-half the work and to furnish one-half the necessary equipment and supplies, the laboring oar is nevertheless with Long. There is a provision in the agreement to the effect that if either party shall fail or refuse to perform the work or to furnish the materials, it shall be optional with the other to carry on the enterprise, in which case the party in arrears shall pay "the reasonable and proper price" for such party.

It will be observed that the contract is incomplete in an important, and in our view a vital particular. The means to be employed in the doing of the work are not specified. As will be seen upon examination of the correspondence incorporated into the record, this lack of definite understanding relative to the methods to be employed furnishes a note of discord in all the subsequent negotiations of the parties.

Long at no time went on the property. He did not perform, or commence performance of his undertaking. (Trans. p. 46.) The bulk of the evidence in the case consists of letters exchanged between the parties, Daly

writing from Silver City and Long writing from Baker City (Trans. pp. 26-45).

The first year, commencing with October 1, 1918, seems to have been passed over by mutual consent. Contemplating the approach of October 1, 1919, at which time it was provided that he must commence work at all events, Long on August 14, 1919, wrote to Daly from Baker, the letter being made up mainly of inquiries (Trans. p. 32). This letter seems to have been taken by Daly as a declaration of intention on Long's part to commence work, as agreed. He states in his reply (Trans. p. 33), and also testified upon the trial (Trans. p. 47), that he at once commenced to clean out the lower tunnel, that being the location of the winze in which the work was to be done. In his reply letter written at once upon receipt of the communication from Long, Daly answers the inquiries and closes by expressing a desire to know what day Long is coming.

On September 19 following, Long writes, again making inquiries, and stating that if it suits Daly not to commence work, that he should give Long something to show that "these arrangements" are satisfactory, and Long would record it (Trans. p. 33). Not receiving an immediate reply to this letter, Long on September 30 wrote Daly to the effect that he is ready to fulfill his agreement, stating "Providing you wish to commence work October 1 you can put on a man and I will pay the bill." A copy of this letter was sent to the County Recorder (Trans. p. 35). Meanwhile, on September 26, Daly had responded, stating in his

reply: "You state in your letter that your affairs are not in shape for to permit you to start work on my claims this winter * * * There is only one reason why I am so anxious to work the property at an early date, is the condition the tunnel is getting in. I have put in two months' work on the claims this summer, and expect to put in two more months before the snow flies * * * It is not a matter of assessment work with me. It is the object of developing pay ore." (Trans. p. 34).

Upon receipt of the letter from Long, a copy of which had been sent to the County Recorder, Daly, on October 13, 1919, wrote to Long, stating: "I will give you an extension of time to carry out the agreement * * * In regard to the extension of the agreement, I will wait until we can meet if you cannot come up here" (Trans. p. 36). To this letter Long made no reply until almost four months later, and the correspondence which then ensued (Trans. pp. 36-39) evidently influenced the Trial Court very strongly in arriving at his decision.

It is apparent from an examination of this correspondence that Daly resented the failure of Long to reply to his letter of the previous October. It also appears here and elsewhere in the correspondence that Long considered the installation of electric power as desirable in the doing of the work. Daly does not readily fall in with this idea because of heavy expense and because of the meagre finances of the parties. In his letter of September 26, 1919 (Trans. p. 35), Daly writes: "I look at the proposition this way. If

we have to install machinery, and especially electric machinery, it will be a heavy expense for both of us." In his letter of February 9, 1920 (Trans. p. 37), he states: "I have come to the conclusion that this proposition is too expensive for workingmen like us with only our limited capital behind us."

In the letter last mentioned Daly endeavors to persuade Long that it would be to the advantage of both mutually to abandon the contract. But in his reply to this letter (Trans. pp. 38-39) Long flatly refuses to do anything of the kind and declares his intention of preserving his rights and of proceeding with the contract. He further states: "Possibly you think best not to install machinery at the present time, which possibly would be best, but this does not keep us from doing hand work and going right ahead and sink."

About the time of this correspondence, in February, 1920, the two had a telephone conversation in which Long asked about the feasibility of going to work on the property at that time, and Daly advised that it would be impossible to get in with the necessary supplies on account of the deep snow on the mountain (Trans. p. 46).

This flareup between the parties in February, 1920, seems to have spent itself and to have become dissipated by the mutual interchange of views, and when the correspondence is resumed in July, 1920, complete harmony prevails.

Daly's statement in October, 1919, that he would give Long an extension, was treated and considered by both parties as a year's extension of the time within

which Long must commence work (Trans. p. 48). With this time limit in view, Long on July 12, 1920, wrote Daly that he would shortly be over; that he thought it best to install a jackhammer outfit, "and if you are not able to carry your part, I will try and install the outfit so we can get started, and you can pay for your part when you get able to take care of it. * * * I have confidence in your property and intend to live up to my part of the agreement, and I will help you to live up to your part." (Trans. p. 40.)

To this letter, on July 21, Daly replied (Trans. p. 41). The letter is dated 8/21/20, but internal evidence and also Long's answer to it prove it to have been written in July. In this letter Daly speaks optimistically of the enterprise and looks forward to Long's arrival. He says, "The tunnel is in as good shape as it was last year. I think two men would put it in good shape in three weeks or a month." He readily falls in with Long's proposal to install a jackhammer outfit and says: "They have changed management of the Florida Mountain Company since I spoke for power. They might permit us to hook on to the Black Jack transformer." Replying to Long's proposal to give him time to pay for his share of the machinery which Long desires to install, Daly writes: "If you are willing to put up my share of installing the machinery I will require a written agreement when I shall pay my share."

Fearful, as he states in his oral testimony (Trans. p. 49), that the usual knockers in the camp would talk down his property, Daly urges Long not to talk about his business with anyone, but to come straight to the property.

Following upon this exchange of letters in July, 1920, Daly went to work, as he had done the previous year, to clean out the tunnel and to get ready for Long's coming. On October 1, he was on the ground ready to go to work, as he had done on the appointed day of the previous year (Trans. p. 47). On September 27, 1920, Long by registered letter wrote from Baker, in substance and effect, that he was unable through lack of money to commence work as agreed (Trans. pp. 42-43). He writes: "However, if you want to work there this winter, go ahead and put on a man and hire him as reasonable as you can and start in October 1, and send in the bill to me at Baker, and I will pay my part, according to my agreement with you, which is on record. * * * And in case you don't want to work there you can give me an extension of time and I will file same." He also inquires how much he is going to owe Daly for assessment work. Evidently as an inducement to Daly to grant him an extension of time, he states: "I am confident by early spring will be able to make a turn * * * (If so) I will install a power plant for hoisting and drilling and I will make you a present of a half interest in same."

This letter seems to assume, as did the other written the previous autumn, a copy of which was sent to the County Recorder, that Daly was under obligation to hire a man in Long's stead and to accept, in lieu of performance, Long's promise to pay the man's wages.

To this letter Daly replied (Trans. pp. 43-44) on October 2, 1920: "I am real sorry you were unable to make a deal * * *. I do not want to stay here this winter because I am not prepared to do the work

I want to do. As to hiring a man, I cannot work him to advantage. I am through with the assessment work, but I am still working in the lower tunnel. * * * I consider that you do not owe me anything for assessment work. If we ever got started to do anything I would have that much coming to my credit. *I do not want to grant you an extension of time on the present agreement.* It will be time enough when you are ready to commence work. *I will give my reason. Somebody might want an option, a lease, or a bond. I could not give either if the property is tied up.*"

Thereafter Daly continued work on the property until the middle of November (Trans. p. 48). Long did nothing. He did not even reply to Daly's letter.

In May, 1921, Long learned that good ore had been encountered in or near the Daly property. At once, and for the first time, he hurried to Silver City. There he spent a part of a day and one night and then returned to Baker (Trans. pp. 53-54). He testified that while in Silver City he learned at the office of the County Recorder that Daly had given a bond on the property to the Banner Mining Company, and that the contract bore the date of January 6, 1921 (Trans. pp. 51-52).

Of this trip to Silver City he gave Daly no notice, either before or after (Trans. p. 54). On June 28, 1921, he wrote Daly from Baker referring to the contract with the Banner Mining Company and asking how his interests in the property have been protected (Trans. p. 45).

Thereafter Daly commenced this action in the Idaho Court. The cause was removed to the Federal Court on application of the defendant, on the ground of diversity of citizenship. The case was tried in September, 1922. It appeared on the trial that Long had never been on the property and had never done or caused to be done any work thereon, and that he had at no time furnished any supplies or equipment for the property, nor had he ever paid Daly any money on account of assessment work or otherwise (Trans. pp. 47-48).

The Trial Court entered a decree in which it was adjudged that the defendant "Has not forfeited any rights or interest acquired by him in and to the mining claims, premises and property described in the bill of complaint herein, under the agreement between plaintiff and defendant, dated June 24, 1918", and it was further ordered and decreed "That plaintiff's bill of complaint for a decree quieting his title to said premises and property being the same hereby is dismissed, each party to pay his own costs." (Trans. pp. 59-60). From this decree the plaintiff has appealed.

ASSIGNMENT OF ERRORS

I

The Court erred in holding as a matter of law that the plaintiff was not entitled to a decree quieting title to the premises described in the complaint, and in dismissing the bill of complaint.

This is a general assignment toward which the entire brief is directed.

II

The Court erred in holding as a matter of law that the agreement between the parties is a complete and valid contract, capable of being enforced by either party.

III

The Court erred in adjudging and decreeing that the defendant has not forfeited any rights or interest in and to the mining premises described in the complaint under the agreement between the parties, and in holding as a matter of law that the defendant acquired any right or interest in the property by virtue of the agremeent between the parties.

This is a combination of Assignments Nos. III and IV enumerated in the transcript. The two in reality constitute but one assignment.

IV

The Court erred in holding as a matter of law that the appellant waived performance on the part of the appellee of the terms of the contract between the parties concerning the development of the property in controversy.

Under this head Assignments Nos. II, V and VII, enumerated in the record, will be discussed, The three constitute but a single assignment and depend upon the question of waiver of performance.

ARGUMENT

II

The Court erred in holding as a matter of law that the agreement between the parties is a complete and valid contract capable of being enforced by either party.

As heretofore pointed out, the contract between the parties is incomplete in certain vital particulars. The method or means to be employed in the doing of the contemplated development work are not specified. At the inception of performance the parties are confronted by the question of the choice of means. Shall the work be done by hand drills, or shall power drills be installed? Shall the waste be hoisted by hand windlass or shall a gasoline hoist or an electric hoist be installed? These are vital questions upon which depend the outlay of money required. The contract leaves their determination to the future agreement or disagreement of the parties.

As a matter of fact, the parties never did reach an agreement on this subject. It is our contention, in as much as the contract remains wholly executory, that it is incapable, for the reasons given, of being enforced by either party. It cannot be made the subject of a decree for specific performance.

> Pomeroy Eq. Jur. (4th Ed.), Sec. 1405.
> Pomeroy Eq. Rem. (2nd Ed.), Sec. 2186.
> Stanton vs. Singleton, 59 Pac. 146.

Neither will it support an action for damages.

> Page on Contracts (1st Ed.), Secs. 27-28.
> 6 R. C. L., pages 617 and 644.
> 13 C. J. 264, Note 82.
> Weldon vs. Degan, 150 Pac. 1184.

The defendant, by virtue of the contract alone, has no interest in the title, nor can he acquire any interest

through the medium of a decree for specific performance. The contract, then, does not affect the title which plaintiff seeks to quiet in himself, and affords, therefore, even though still subsisting, no defense to the action.

Meyer vs. Quiggle, 74 Pac. 40.

III

The Court erred in adjudging and decreeing that defendant had not forfeited any rights or interest in and to the mining premises described in the complaint under the agreement between the parties, and in holding as a matter of law that the defendant acquired any right or interest in the property by virtue of the agreement between the parties.

The Trial Court seems to have proceeded upon the theory that the defendant, by virtue of the contract alone, acquired some equitable interest in the property. Carrying out this theory to its logical conclusion, it was assumed that the action was brought for the purpose of declaring or enforcing a forfeiture of that interest, or at least that such forfeiture would be the necessary result of a decree in favor of the plaintiff; and forfeitures not being favored in law, it was thought to be incumbent upon the Court to seize upon any possible circumstance in the case which might relieve the defendant from the forfeiture of his interest. That the Court's consideration of the evidence was colored by this assumption is manifest from the language of the decision. Indeed, this theory is reflected in the decree, for the Court not only orders a dismissal of the complaint, but formally adjudges and decrees that the de-

fendant "has not forfeited any rights or interest acquired by him in and to the mining claims" under the agreement with the plaintiff. This is not only a recognition, but is a solemn, if indirect, adjudication, of an undefined interest in the property on the part of the defendant. In this particular the judgment seems to us to be erroneous and highly prejudicial to the plaintiff.

1. There is in the contract between the parties no present grant of an estate or interest. The defendant, by virtue of the contract alone, acquired no interest, legal or equitable, in the mining premises. The plaintiff agrees to place a deed in escrow. The defendant agrees to perform certain labor in opening up the property. The consideration for the interest is not the *agreement* of Long to perform the services. The consideration to be paid for the interest is the *performance* of the services. The contract so provides in express terms.

Long's interest was to be earned by performance and was to vest only upon performance. Performance then, or at least commencement of performance, was by the parties made a condition precedent to the vesting of any interest in Long. Upon full performance by him his equitable estate would vest and he would then be in position to demand the conveyance of the legal title.

Failure to commence performance within the time expressly limited in the contract at once terminates it, so far as Long is concerned. The agreement so provides. Daly, upon the happening of such contingency, is given the right to treat the contract as at an end.

The fact that he may, in such case, have alternative, though wholly inadequate, remedies under the contract, does not affect the absolute right given him by the terms of the contract itself to treat it as terminated and abandoned.

2. It necessarily follows from what has been said that this action is not brought for the purpose of enforcing or declaring a forfeiture. If that were its purpose, there would be no need to bring it. The plaintiff has the legal title. He is and always has been in the exclusive possession of the property. Long has no title, legal or equitable. He is not and never has been in the possession of the property or any part of it.

The contract, however, is of record, and Long is asserting an interest under it. Considerations having to do with the sale of the property, as well as with the circumstance that the facts surrounding the transaction are apt to be dissipated by death or obscured by the lapse of time, all make it desirable and indeed necessary that suit be instituted in order that the cloud may be removed and any question concerning the propriety of defendant's claim may be determined and set at rest. The action is brought under the provisions of Section 6961 of the Compiled Statutes of Idaho, which is as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The complaint alleges in general terms the title and possession of the plaintiff, the assertion of some right

by the defendant, and prays that defendant be required to set forth the nature of his claim. (Trans. pp. 8-9.) In his counter-claim the defendant sets up the contract and asserts that it is still operative, performance having been waived or excused by the plaintiff (Trans. pp. 10-13). In his reply to the counter-claim the plaintiff admits the execution of the contract, but denies that it is still operative or that its performance has been waived (Trans. pp. 21-25). If the contract is still operative, it affords, perhaps, a defense to the action. Otherwise, it affords no defense. In determining that question in favor of the plaintiff, the Court neither declares nor enforces a forfeiture.

Nor is this one of that numerous class of cases in which the proceeding to quiet title is based upon a completed forfeiture, as where, upon breach of a condition subsequent, the grantor has, before suit, declared the forfeiture and effected a re-entry of the premises. There the forfeiture is present, though as an accomplished fact. Even in such cases Courts of Equity do not hesitate to grant relief to the complainant. As illustrations of this class of cases, see:

Big Six Development Co. vs. Mitchell, 70 C. C. A. 569, 138 Fed. 279.

Gadbury vs. Ohio Consolidated Gas Co., 62 L. R. A. 895.

Brewster vs. Lanyon Zinc Co., 72 C. C. A. 213.

Pendill vs. Union Mines Co., 31 N. W. 100.

Brown vs. Vandergraft, 80 Pa. 142.

Parsons vs. Smilie, 32 Pac. 702.

Maginnis vs. Knickerbocker Ice Co., 112 Wis. 385.

In Pendill vs. Union Mines Co., supra, where forfeiture of a leasehold was incurred by breach of a condition subsequent, the Court states:

> "The bill treats the lease as a void encumbrance, under which the defendant company, by its claims thereunder, clouds complainant's title. The Court is not asked to declare the forfeiture, but to ascertain whether or not a completed forfeiture exists, and if so to remove the cloud."

Similarly, in Big Six Development Co. vs. Mitchell, where a leasehold estate was likewise forfeited by breach of a condition subsequent, it is stated:

> "It is also urged that the bill cannot be maintained because it is a bill to enforce a forfeiture, and equity never lends its aid to enforce a forfeiture or penalty. But, as we understand it, the theory of the bill is not that, but is that the forfeiture was complete before the bill was filed, that the lease was dead, and that the defendant was threatening and was guilty of a continuing trespass. We think the bill may be maintained upon this ground."

In all cases of the above character there had been a present grant of an estate or interest which had become vested. The forfeiture of the estate occurred as the result of the breach of a condition subsequent. In the case at bar, there being no present grant, no estate or interest had become vested. There could under such circumstances be no forfeiture of it, either before or after suit.

Conditions precedent and subsequent are defined in 13 C. J. 565 (Note) as follows:

> "A condition precedent is one by the performance of which a right, estate or thing is obtained or gained; a condition subsequent is one by the performance of which a right, estate or thing already obtained is kept and continued."

No forfeiture can properly be predicated upon a breach of a condition precedent. There are, however, many cases where, though no interest has become vested, because of failure to perform a condition precedent, nevertheless the party failing to perform has already paid part of the purchase money or has parted with valuable property which has been received by the party asserting the breach, or where valuable improvements have been made which, upon breach of the condition, inure to the benefit of the promisee. Under such circumstances, although there can properly be no question of forfeiture, no estate having vested, nevertheless there are equitable considerations which sometimes impel Courts of Equity to find, upon slight evidence, that the breach of the condition has been waived or excused. But it is the general rule that Courts of Equity will not relieve against loss or forfeiture incurred by a breach of a condition precedent.

In Pomeroy's Equity Jurisprudence (4th Ed.), Par. 455, the rule is stated to be:

> "When the contract is made to depend upon a condition precedent—in other words, when no right vests until certain acts have been done—then, also,

a Court of Equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent."

As illustrations of this rule see:

Harper vs. Tidholm, 40 N. E. 575.
Granville Lumber Co. vs. Atkinson, 234 Fed. 424.
Wood vs. McGraw, 127 Fed. 914.
Waterman vs. Banks, 144 U. S. 394, 36 L. Ed. 479.
Bartlesville Co. vs. Hill, 121 Pac. 208.

In Davis vs. Gray, 83 U. S. 203, 21 L. Ed. 447, it is said:

"There is a wide distinction between a condition precedent, where no title has vested, and none is to vest until the condition is performed, and a condition subsequent operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interfere and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained."

In Clarno vs. Grayson, 46 Pac. 426, Judge Wolverton, then on the Oregon Supreme bench, discusses this matter at length. He states among other things:

"If the right acquired by the terms of the contract is simply a right to acquire a right or an interest in the subject matter of the contract, it is not then a question of the forfeiture of any vested right in the property or a divestiture of title, whether termed legal or equitable, but a question of the enforcement or non-enforcement of a stipulated personal right or privilege. The privilege of acquiring a vested, equitable right must be distinguished from the right."

In People vs. Center, 6 Pac. 481, the California Supreme Court had under consideration an action by the state to quiet title in certain lands which were being reclaimed by various individuals who sought to acquire title by complying with the state enabling act, which contemplated the reclamation of the land within three years. The Court states:

"The appellants contend that if they and their associates have not the legal title, yet by reason of expenditures on the lands, they have acquired an equity which should protect their possession, as against any proceeding *in a Court of Equity*. It is said the present suit is to enforce a forfeiture, and that equity will not entertain a bill to declare or enforce a forfeiture. * * * But the action is not to forfeit any rights of the defendants. It is an action under Sec. 738 of the Code of Civil Procedure. It is true, a Court of Equity does not favor forfeitures. It will not aid in divesting an estate. It may interfere to prevent the divesting

> of an estate. But here there is no question of forfeiture. By the terms of the agreement the whole of the work required was a condition precedent, and a Court of equity will not, by its decree, give an estate which has never vested."

In all the cases where the equitable rules relative to forfeitures have come up for discussion, it will be found that an estate or interest has become vested, or, if not, that something of value, whether money or property, has been parted with, or valuable improvements have been made by the party against whom the breach of the condition is being urged. There is something of substance, concrete and tangible, that the Courts can put their fingers on. Even in such cases Courts of Equity do not disregard the contract which the parties themselves have made, nor do they capriciously interfere to relieve parties from the consequence of their own covenants.

But in the case at bar, there is nothing of substance which would invoke in any of its forms the maxim that forfeitures are not favored. The defendant neither has forfeited nor is he called upon to forfeit anything. He has not parted with anything, nor has the plaintiff received anything. True, he testified on the trial that he had at one time purchased some supplies to be consumed on the ground, and at another time had bought a gasoline hoist for use there. Aside from the fact that the correspondence does not bear out the claim that he bought these things for use on the Daly property, it is certain that he never sent them there and that he still has them.

Long, under the contract, obtained the privilege of acquiring an interest in the property. It follows from what has been said that the only question in the case is whether that privilege is still available and open to him. If it is, then the contract, on the assumption that it is a complete instrument, affords a defense to the action. And the question as to whether that privilege is still open to him is purely a question of contract, having no relation to the equitable attitude toward forfeitures. Further than that, the burden is on the defendant to prove that the contract is still operative. As stated in People vs. Center, supra:

> "The *onus* was on the defendants to show that they should be relieved of the alleged 'forfeiture', or rather that they should be relieved of the consequences of a failure to execute their contract according to its terms."

Long agreed to begin work not later than October 1, 1918, and at all events not later than October 1, 1919. This time was by the plaintiff extended for one year. It was also provided that if Long should default in any one or more of the provisions of the contract by him agreed to be observed and performed, then his rights in the premises should at once cease, and Daly should be entitled to treat the contract as terminated. These conditions were inserted for the benefit of Daly. They were perfectly lawful conditions and ones which Daly had a right to impose. Long accepted them as an integral part of the contract, and agreed to be bound by them. These provisions the Court has no

right to disregard and by ignoring them make a contract for the parties different from that which the parties made for themselves.

It is perfectly obvious that Long is in default. He did not perform, nor did he commence or tender performance, either within the time limited or afterwards. Nor was performance on his part prevented by the act of the plaintiff. It remains only to inquire whether the plaintiff waived performance. If performance was not waived by the plaintiff, then the latter was clearly within his rights in treating the contract as at an end.

The question of waiver then is the only question in the case and it is to be considered on its own merits—not examined through glasses colored with the desire of the Court to relieve from an unfavored forfeiture.

IV

The Court erred in holding as a matter of law that the appellant waived performance on the part of the appellee of the terms of the contract between the parties concerning the development of the property in controversy.

It is a universally established principle that estoppel is an indispensable element of waiver. Where there is no estoppel, there is no waiver.

Frankfort-Barnett Co. vs. Wm. Prym Co., 150 C. C. A. 223.

Hampton Stave Co. vs. Gardner, 83, C. C. A. 521.

Williams vs. Neely, 67 C. C. A. 171.

Maginnis vs. Knickerbocker Ice Co., 112 Wis. 385.

Ludlow vs. N. Y. Etc. Railway Co., 12 Barb. 440.

Underwood vs. Insurance Co., 57 N. Y. 505.

Dickens vs. Sexton, 43 N. Y. S. 167.

New York Life Insurance Co. vs. Eggleston, 96 U. S. 572, 24 L. Ed. 841.

Globe Mutual Insurance Co. vs. Wolfe, 95 U. S. 326, 24 L. Ed. 387.

Big Six Development Co. vs. Mitchell, 70 C. C. A. 569, 138 Fed. 279.

"An estoppel is an indispensable element of waiver. Where there is no estoppel there is no waiver, and the undisputed evidence is that the requisite elements of an estoppel are lacking. They are: ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and the innocent and detrimental change in reliance upon that representation."

Hampton Stave Co. vs. Gardner, supra.

"The essence of waiver is estoppel. Where there is no estoppel there is no waiver."

Williams vs. Neely, supra.

"The doctrine of estoppel lies at the foundation of the law as to waiver."

Underwood vs. Insurance Co., supra.

"There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby."

Frankfort-Barnett Co. vs. Wm. Prym Co., supra.

The cases stating this principle might be multiplied indefinitely.

It follows that there was no waiver of commencement of performance on the part of Long, unless Daly, by his words or conduct, has estopped himself from setting up the default.

As heretofore pointed out, the Trial Court seems to have been greatly influenced by the attitude of Daly as expressed in the correspondence between the parties in February and March, 1920 (Trans. pp. 36-40). In this correspondence Daly endeavored to persuade Long that it would be to the advantage of both, in view of their limited means and the desire of Long to install machinery, mutually to abandon the contract. Long, however, positively and unequivocally refused to abandon the enterprise, asserting his desire and his intention of proceeding under the agreement. The subject was not again mentioned between them, but when the correspondence was resumed in July (Trans. pp. 40-41) it is assumed by both parties that work under the contract would be proceeded with in accordance with its terms.

A contract may be terminated by the mutual agreement of the parties to rescind. But where one party makes overtures looking toward a mutual rescission, or expresses a desire to rescind, the other party is not thereby relieved from performance unless he acquiesces in the rescission. He cannot stand on the contract and at the same time refuse to perform it on the theory that he is relieved of performance because the other party at one time expressed a desire to rescind. Nor

can his vigilance with respect to his own performance be safely relaxed because the other party may have become discontented with the terms of the contract, even to the extent of manifesting a desire to be relieved of its obligations.

It is evident that both Daly and Long took the view that Daly had granted Long a year's extension of time, and that this extension expired October 1, 1920. In his letter of September 27, 1920 (Trans. p. 42), Long, after explaining the failure of his plans, states:

> "However, if you want to work there this winter go ahead and put on a man and hire him as reasonable as you can and start in October 1st and send in the bill to me at Baker and I will pay my part, according to my agreement with you, which is on record. * * * And case you don't want to work there you can give me an extension of time and I will file same."

In his reply (Trans. pp. 43-44), written October 2, 1920, Daly states:

> "As to hiring a man, I cannot work him to advantage. * * * I do not want to grant you an extension of time on the present agreement. * * * I will give my reason. Somebody might want an option, a lease or a bond. I could not give either if the property is tied up."

It is perfectly apparent that the parties understood that Long must commence performance October 1, 1920, unless Daly should grant him a further extension. This

practical construction given the contract by the parties themselves is, of course, controlling. Indeed, no other construction is possible unless it be assumed that Daly had intended to grant an indefinite and permanent extension.

It is clear that Long defaulted as the result of his failure to commence work at the time indicated. If Daly waived this default, it must have been by virtue of the terms of his letter of October 2, 1920. If Daly is estopped, the estoppel must be predicated upon this letter.

Taking that letter by its four corners, it is capable of but one construction. Daly refuses to put on a man in Long's place, as requested. He declines to grant an extension of time on the present agreement. He gives his reason for so doing. If he were to give Long further time, the property would remain tied up under the agreement. This situation he is determined to avoid. He desires to be free to make other arrangements relative to the development or disposition of his property, should the opportunity present itself.

No estoppel to claim the benefit of Long's default can be predicated upon this letter. The elements of an estoppel are wholly lacking. There was no misrepresentation by Daly. There was no change of position by Long. Long could not have been led to believe, from the language of this letter, that Daly had granted him a further extension of time. The letter could not have induced him to conclude that further delay on his part would not be regarded by Daly as an abandonment of the contract. It could not have induced him to believe

that Daly would put on a man in his place and rely upon Long's promise to pay the bill.

It is true Daly intimates in this letter that if, at some future time, Long should find himself in position to commence work upon the property, and Daly had meanwhile made no other disposition of the claims, then Daly would be willing to consider the making of another contract with Long. Should such situation thereafter arise, Daly would be entitled to credit for the assessment work which he had been doing. Long, however, owes him nothing under the existing agreement, and of that agreement there would be no further extension.

This letter is couched in mild and courteous language, but in all essential particulars there is no mistaking its upshot. It cannot be held to have given rise to an estoppel against Daly unless it was reasonably calculated to induce Long to believe that he might lie idle and inert for an indefinite period and still have preserved to him all his rights and privileges under the contract.

If Daly had not written this letter—if he had not replied to Long's communication of September 27, 1920—it may be assumed that his previous attitude with respect to the enterprise may have been such as to induce Long to believe that he might safely delay commencement of performance on his part. It may also very well be that, under the circumstances, Long's privileges under the agreement were not absolutely terminated by his failure to commence work on October 1, 1920, and that he had a reasonable time after the

receipt of Daly's reply in which to comply with his contract. But certainly upon receipt of Daly's letter, it became incumbent upon Long to act with reasonable promptness. We would expect him promptly to go to Silver City and either commence work or persuade Daly to grant him an extension of time. We might expect him to send money to Daly with which to hire a man in his place. The very least that must have been expected of him, should he have desired to keep the contract alive, was a prompt expression of his views of the situation or of his intentions relative to the carrying out of the agreement.

The fact is that Long did nothing at all. He did not even reply to Daly's letter. To all outward appearances he completely abandoned the enterprise.

It is to be gathered from his letters that Long took a peculiar and wholly unauthorized view of Daly's obligations under the contract. In his letter of September 30, 1919 (Trans. p. 35), Long states:

> "I am ready to fulfill my agreement with you and go ahead with the development work on the Daly group of quartz mining claims according to our agreement on file, County Recorder's office. providing you wish to commence work October 1. You can put on a man and I will pay the bill."

In his letter of February 18, 1920 (Trans. p. 38), he states:

> "I wrote you September 30 that I was ready to fulfill my agreement with you, filing a copy of the same in the office of Co. Recorder of Owyhee

> County instructing you to put on a man and proceed with the work and I would pay the bill."

In his letter of September 27, 1920, in the quotation heretofore given, he states:

> "If you want to work there this winter go ahead and put on a man and hire him as reasonable as you can and start in October 1st and send in the bill to me at Baker and I will pay my part, according to my agreement with you, which is on record."

In this connection Long no doubt has reference to the clause in the contract commencing at the bottom of page 16 of the Transcript, in which it is recited that either party shall have the right to carry on the enterprise, even though the other fails or refuses to do so, in which event the party failing to perform "shall repay the reasonable and proper price for such party". Long appears to take the attitude that on his own failure to proceed Daly was under the necessity of proceeding for him.

Daly never acquiesced in this construction of the contract. In his letter of October 13, 1919 (Trans. p. 36), he states:

> "I did not put a man to work as requested. I will give you an extension of time to carry out the agreement."

In his letter of October 2, 1920, he also indicates his refusal to put on a man in Long's place. It is obvious that Daly was under no obligation to carry out Long's part of the contract, as well as his own. It is elemen-

tary that a party to an agreement cannot give it an unauthorized construction, and then take refuge behind such construction. Yet that is apparently the precise thing that Long has attempted to do in this case. He appears to say to Daly: "I am carrying out my contract because I am directing you to put on a man in my place and send me the bill." Indeed this is the attitude which counsel for Long himself took in the trial of the case in the lower Court.

Daly, under the circumstances, was fully justified in assuming that the contract had been abandoned by Long and he acted accordingly. He remained on the property until the middle of November following (Trans. p. 48), and thereafter seems to have treated the contract as abandoned.

Some seven or eight months after his receipt of Daly's letter of October 2, Long learned of good ore being encountered in or near the Daly group. This news seems to have galvanized him into activity, and he went to Silver City, remaining over night (Trans. p. 54). On June 28, 1921, he wrote Daly asking how "my interests in these properties" have been protected.

In Waterman vs. Banks, 144 U. S. 394, 36 L. Ed. 479, it is stated:

> "In Taylor vs. Longworth, 39 U. S. 172, the principle was recognized that time may be of the essence of a contract for the sale of property, not only by express stipulation of the parties, but from the very nature of the property itself. This principle is particularly applicable where the property is of such character that it will be likely to undergo

> sudden, frequent or great fluctuations in value. In respect to mineral property it has been said that it requires, and of all properties, perhaps, the most requires, the parties interested in it to be vigilant and active in asserting their rights."

It follows that the contract between these parties affords no defense to this action.

First, because no interest in the title has become vested in the appellee.

Second, because it is incomplete and unenforceable in equity.

Third, because Long is in default under it, and his default is of such a character and his lack of diligence is so gross and palpable that he has no standing whatever in equity; and

Fourth, there was no waiver by Daly of Long's default, because in Daly's conduct and attitude with respect to the default the elements of an estoppel are lacking.

The decree appealed from in effect relieves the defendant of the necessity of performing his contract. It recognizes an undefined interest in the property as already vested in the defendant, contrary to the plain terms of the agreement. And it leaves the plaintiff helpless, his property unmarketable, and himself at the mercy of the defendant.

The judgment should be reversed.

Respectfully submitted,

WILLIAM HEALY,
Solicitor for Appellant.

No. 3988

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

J. W. DALY,
Appellant,

vs.

C. W. LONG,
Appellee.

BRIEF OF APPELLEE

On Appeal from the United States District Court for the District of Idaho, Southern Division

J. H. RICHARDS,
OLIVER O. HAGA,
McKEEN F. MORROW and
J. L. EBERLE,
Solicitors for Appellee,
Residence: Boise, Idaho.

Filed ..... 192.....

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STATEMENT OF THE CASE

In form this is a suit by Appellant to quiet title to certain mining claims. In reality, however, it is a suit to have it officially adjudged and decreed that Appellee has forfeited all rights under a contract wherein Appellant agreed to convey to Appellee an undivided one-half interest in said claims. The status of this contract is the objective of the suit, regardless of the name given the action by Appellant, and the case turns on the question of whether Appellee still has the rights originally acquired under the contract, or whether such rights have been forfeited or lost.

The District Court found in effect that Appellee, under the facts disclosed by the oral and documentary evidence, was not in default and had not forfeited his rights under the contract. The case presents no new or novel principles of law. It is merely a question of fact whether Appellee was justified in assuming from Appellant's letters, statements and conduct that the latter acquiesced in postponing the date when certain development work should be commenced. This work was to be done by the joint efforts or at the joint expense of Appellant and Appellee, and Appellee in good faith believed that Appellant not only acquiesced in the postponement of such work, but that Appellee was doing Appellant a favor by not insisting on going on with the work at a time when Appellant's letters indicated that it would be a burden to him to have to do his share or pay his one-half of the expense. As stated above, the Trial Court found the facts in favor of Appellee, and, accordingly, held that Appellant was not entitled to a decree quieting his title as against the contract between the parties to the suit, and hence dismissed the Bill.

The complaint is of the usual form to quiet title and it calls upon defendant (Appellee) "to set forth the nature of his claim" (Rec., p. 9). The prayer is such as is usually found in Bills to quiet title and among other things Appellant prays that "the defendant be forever enjoined and debarred from asserting any claim whatever in or to said mining claims", etc. (Rec., p. 9). Appellee in his answer set up the contract between the parties, dated June 24, 1918, and claims only such interest and right in and to said

mining claims as he may be entitled to under such contract, and alleges and shows that he is and always has been able, ready and willing to carry out the terms of the agreement by him to be kept and performed, and shows that the delay in doing the work had been mutually agreed to and that plaintiff "has urged and requested the postponements and delays above referred to, and said plaintiff has further from time to time urged that it was inopportune because of climatic, or financial or other local conditions to do the work at the times and in the manner contemplated by said agreement" (Rec., pp. 10-13). The agreement is attached as an exhibit to the answer (Rec., pp. 13-21).

The evidence consists largely of letters that passed between the parties. These were introduced by Appellant as part of his case in an effort to show an abandonment or default by Appellee (Rec., pp. 26-45). The property had no known value. Appellant himself says: "It is a prospect having no developed ore" (Rec., p. 45).

There is no controversy over any delay or postponement prior to the fiscal year commencing October 1, 1920. It is conceded by Appellant and his counsel that Appellant consented to and acquiesced in the development work being postponed or deferred until that date. Appellant says (Rec., p. 48):

> "That witness gave Long an extension from 1919 to 1920; that he gave him a year's extension; that the extension was given in October, 1919 by letter, in one of the letters introduced in evidence."

And counsel in his brief (bottom of page 8) says:

> "Daly's statement in October, 1919, that he would give Long an extension was treated and considered by both parties as a year's extension of the time in which Long must commence work."

It should be noted, however, that Mr. Long, on September 30, 1919 (Rec., p. 35) wrote Appellant that:

> "I am ready to fulfill my agreement with you and go ahead with the development work on the Daly Group of quartz mining claims according to our agreement on file in the County Recorder's office, providing you wish to commence work October first. You can put on a man and I will pay the bill. Will be over later on. Did you get my letter."

To which Appellant replied on October 13 (Rec., p. 36):

> "I did not put a man to work as you requested. I will give you an extension of time to carry out the agreement. *I can't work this winter on these claims and keep up my end of the expense.* Everything is very high. I am of the same opinion as you are in regard to working these claims. We should wait until we can install some kind of machinery."

Later, on February 3, 1920, Appellee again wrote to Appellant, as follows (Rec., pp. 36-37):

> "I would like to hear from you by return mail and know whether or not you are working, and if

not would you want to work any more on the claims. Providing, however, we could do anything there that is in the way of hand work and *you think it advisable to go out and go to work.* Please let me know all the particulars, that is, just what I would need to bring in the way of tools and bedding and what the probable cost of a grub stake, and where we would buy, etc. *I have some time and would like to get busy.*"

Instead of asking Appellee to come over and go to work or showing any desire to cooperate or join in doing the work, Appellant writes on February 9, 1920, (Rec., p. 37):

"Things have not come my way since I entered into the agreement with you. I was handicapped last year on account of my hand. It cost me several hundred dollars. I have not much grip in that hand. One finger is stiff. It is my left hand. I may have to get that finger amputated yet; it is always in the way when I am working. *Now, to be candid with you, I don't believe that I will ever be able to carry out the terms of that agreement.*"

To this Appellee replies on February 18, 1920 (Rec., pp. 38-39):

"I wrote you September 30th that I was ready to fulfill my agreement with you * * * instructing you to put on a man and proceed with the work and I would pay the bill. You wrote me saying you could not work this winter and

keep up your part of the expenses and that you had some grub that you wanted to use up before coming out and that you would be in Baker in about six weeks. * * * Now, when I entered into this agreement with you I done so in good faith with the object of helping develop same, and my faith is unshaken and am of the opinion that the claims are good and will develop into a paying mine. I am ready and willing to go ahead with my part of the agreement. I was under the impression you did not care to and could not work on the claims this winter. I do not want to give my contract up. Now, John, I realize you have had hard luck and possibly you think best not to install machinery at the present time, which possibly would be the best, but this will not keep us from doing hand work and going right ahead and sink. Providing, however, you are not able to put up for your part of the expenses, I will help you so we will be able to get along some way and develop the claims. I am figuring on getting some money out of some interests I have, and should I be able to do this I will buy what machinery we need to do this work, and you can pay your part later on. We can fix that part so you will not have to worry. I will not take any advantage of you, on the other hand I will do all I can to help you."

On July 12, 1920, while they were looking forward to doing the work for the year commencing October 1,

1920, Appellee wrote Appellant that he would be in Silver before long, saying (Rec., p. 40):

> "I can ship you a hoist from here either to run by gasoline or electricity. I think it best to install a jackhammer outfit and if you are not able to carry your part I will try and install the outfit so we can get started and you can pay for your part when you get able to take care of it * * * I have confidence in your property and intend to live up to my part of the agreement, and I will help you to live up to your part."

To this Appellant replied (Rec., p. 41):

> "I think it would be a good idea not to ship a hoist until arrangements had been made for power. Then you would know exactly what kind of a hoist to ship * * * If you are willing to put up my share of installing the machinery, I will require a written agreement when I shall pay my share."

On September 27, 1920, Appellee wrote, referring to certain delays in making a sale of some other properties, and he says (Rec., p. 42):

> "I have considered the proposition and should I make a turn or be able to get out a shipment of high grade ore, it is possible and probable I will install a power plant for hoisting and drilling, and I will make you a present of a half interest in same. * * * However, *if you want to work there this winter, go ahead and put on a man and*

> *hire him as reasonable as you can and start in October 1st and send the bill to me at Baker and I will pay my part,* according to my agreement with you, which is on record * * * Let me hear from you soon just what you are going to do. In case you don't want to work you can give me an extension of time and I will file same."

To which Appellant replied on October 2nd, 1920:, and among other things he says:

> *"I do not want to stay here this winter because I am not prepared to do the work I want to do. As to hiring a man, I cannot work him to advantage."*

Shortly after this letter was written Appellant gave the Banner Mining Company an option on the property, but Appellee received no notice of this until he discovered the option on the county records in May, 1921, when he went to the property to do development work (Rec., pp. 51-52).

The contract between the parties provides that:

> "It is further agreed between the parties hereunto that if the said Long shall, *after proper demand by said Daly,* default in any one or more of the provisions of this contract by him hereby agreed to be observed and performed, any and all rights which the said Long shall have in and to the properties herein referred to, either under the terms of this contract or otherwise, shall at once cease and be of no effect and the rights of the said Long in and to said properties under the

terms of this contract or otherwise shall be deemed null and void absolutely," etc. (Rec., p. 19).

The foregoing is the forfeiture provision under which Appellant claims he is entitled to a decree that Appellee has no longer any right, title or interest in the property by reason of said contract.

While the contract provides for "proper demand" by Appellant before declaring the contract at an end, there is no contention that any such demand was made, and the Trial Court found that Appellee was justified in assuming from the letters and conduct of Appellant and his statements over the telephone that he at least acquiesced in the delay. We think the letters are much stronger than that. We think they show a desire on the part of Appellant to delay the work because of his own physical and financial condition, but it is sufficient that there was a waiver by Appellant of the time provisions of the contract, and that he could not put Appellee in default without notice and "proper demand by said Daly."

It should be noted also that the agreement involved is not an "option", but an absolute obligation on the part of Appellee to do one-half the work or pay the wages of a man for doing it, and to pay one-half the cost of the equipment and supplies necessary to perform the work required to be done under the contract. The contract is one of mutual and absolute covenants. Appellant is as much bound to do his one-half of the work as Appellee is to do his share.

BRIEF OF THE ARGUMENT

A "forfeiture" is where a person loses some right, property, privilege or benefit in consequence of having done or omitted to do a certain act.

Meyers vs. State, 47 Tex. Civ. App. 336, 105 S. W. 48.

Whitney vs. Dewey (C. C. A., 9th Cir.), 158 Fed. 385.

Jagoe vs. Aetna Life Ins. Co., 123 Ky. 510, 96 S. W. 598.

While this is not a case for specific performance, and while the relation of the parties to the property is such that a suit for specific performance of this contract can, perhaps, never arise, and hence any discussion of that question is beside the case, nevertheless, the contract gives to Long certain rights in and to the property which the Courts will protect and will specifically enforce when the occasion therefor arises.

Watts vs. Kellar (C. C. A., 8th Cir.), 56 Fed. 1.

3 Pomeroy's Equity Jurisprudence (4th Ed.), Secs. 1260 and 1261 and cases there cited.

Lewis vs. Hawkins, 90 U. S. 119, 23 L. Ed. 113.

Conley Camera Co. vs. Multiscope & Film Co., (C. C. A., 8th Cir.), 216 Fed. 892.

Baker vs Mulrooney (C. C. A., 8th Cir.), 265 Fed. 529.

Ferguson vs. Blood (C. C. A., 9th Cir.), 152 Fed. 103.

Nixon vs. Marr, 190 Fed. 918.

The findings and decree of a Court of Equity are presumptively right, and they should not be disturbed or modified by an Appellate Court unless an obvious error has intervened in the application of the law or some grave mistake has been made in the consideration of the facts.

Manhattan Life Ins. Co. vs. Wright (C. C. A., 8th Cir.), 126 Fed. 82.
Stearns-Roger Mfg. Co. vs. Brown, 114 Fed. 939, 52 C. C. A. 559.
North American Exploration Co. vs. Adams, 104 Fed. 408, 45 C. C. A. 184.

In equity the purchaser is regarded as the owner subject to the liability for the unpaid price and the vendor as holding the legal title in trust for him. This view of the estate of the purchaser is based on the maxim that equity regards and treats as done what in good conscience ought to be done.

27 R. C. L. 464.
Lewis vs. Hawkins, 90 U. S. 119, 23 L. Ed. 113.
House vs. Jackson, 24 Ore. 89, 32 Pac. 1027.
Smith vs. Bangham, 156 Cal. 359, 104 Pac. 689.
Horgan vs. Russell (N. D.), 140 N. W. 99, 43 L. R. A. (N. S.) 1150.
Pomeroy's Eq. Juris. (4th Ed.), Secs. 1260 and 1261.

A forfeiture clause is inserted in a contract to convey real property for the advantage of the vendor and as a penalty for default and such provisions are not

self-executing and do not become operative until exercised, and the Appellant Daly as a competent party to contract could waive any provision that is beneficial to him and equity leans to that construction of the evidence which will prevent the forfeiture of Long's rights.

Graham vs. Merchant, 43 Ore. 294, 72 Pac. 1088.
Pomeroy's Eq. Juris. (4th Ed.). Sec. 459.
Baker vs. Mulrooney, 265 Fed. 529.

When two people who possess the legal capacity to contract actually make a contract, if the contract is not tainted with fraud and does not contravene public policy, it is the duty of a Court of Equity, if its powers are properly invoked for that purpose, to enforce the contract in accordance with its terms.

Morton vs. Allen, 180 Ala. 279, L. R. A. 1916B 11.
Ullsperger vs. Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221.

When a vendor waives the stipulation of a contract prescribing the time of its performance, he cannot rescind without giving the vendee reasonable notice to comply with his part of the agreement.

Watson vs. White 152 Ill. 364, 38 N. E. 902.
Mullin vs. Bloomer, 11 Ia. 360.
Higby vs. Whittaker, 8 Ohio 198.
Graham vs. Merchant, 43 Ore. 294, 72 Pac. 1088.

Appellant seeks a decree relieving him from his obligations under the contract because of some alleged defaults on the part of Appellee. He seeks in effect, though perhaps not in form, a forfeiture of Appellee's rights or a rescission of the contract so that Appellant may sell the property free from every right and claim of Appellee. The burden of proving a sufficient default was on Appellant, and, seeking equitable relief, he must come into Court with clean hands and show beyond question that he has not contributed to the default or led Appellee to believe that concessions would be granted or extensions given.

4 Page on Contracts, p. 3556.
Reeves & Co. vs. Martin (Okla.), 94 Pac. 1058.
Baley vs. Homestead etc. Co., 80 N. Y. 21, 36 Am. Rep. 570.

Time was not of the essence of the contract, and the forfeiture claimed by Appellant is based on *covenant* and not on *condition*, and hence cannot be enforced in any form of proceeding, however fully it may be established.

5 Page on Contracts, Sec. 2579.
Diefenbrock vs. Luiz, 159 Cal. 716, 115 Pac. 743.

ARGUMENT

There is but a single question involved in this case, and that is whether or not Appellee has lost his rights under the contract of June 24, 1918, under which Appellee was to have a half interest in the property and for which in turn he obligated himself to perform

certain work and pay one-half of the cost of certain equipment. It was not an option, but an absolute unqualified agreement on the part of Appellee to assume obligations that would amount in the aggregate to a large sum. For this personal liability and for these obligations, he was in turn to receive an undivided one-half interest in "a prospect having no developed ore" (Rec., p. 45).

The contract is no different in law than if Appellee had agreed to pay $10,000 for an undivided one-half interest, such payment to be made at a stipulated time or times in the future.

The adroit and specious argument of counsel for Appellant about specific performance and the uncertainty of the contract is beside the case. No one is asking specific performance and no occasion can arise hereafter for specific performance of this contract. When Appellee has performed his part, he can go to the escrow holder and receive the deed which was placed in escrow by Appellant. If Appellee fails to perform, Appellant may either rely upon his default and the forfeiture of his interest, or he may sue him and recover a personal judgment for his failure to perform or pay for the labor, material and equipment that he was to furnish under the contract. Counsel is wrong, however, in saying that such contracts will not be protected by Courts of Equity.

> "Every tract of realty is in a way unique. No amount of money will enable one to acquire a given tract for a private purpose without the consent of the owner thereof. It follows that a con-

> tract to convey realty is one the breach of which cannot be compensated for adequately by money damages. Specific performance of such contracts is therefore regularly given by equity if the other elements of the contract are such as to make this remedy proper."
>
> 6 Page on Contracts (2d Ed.), Sec. 3325.

Courts are now more liberal than heretofore in granting specific performance of contracts relating to realty and the cases are numerous where construction contracts have been specifically enforced, it being assumed that in the absence of specifications common usage and the ordinary practice in the matters involved are a part of the contract.

> "It is a well established rule that where a party agrees to do a certain thing and does not specify how it shall be done, the law implies a promise on his part to do it in the usual manner, and that it shall be complete and effectual for the use to which the same kind of thing is generally applied, etc."
>
> Lane vs. Pac. Etc. Ry. Co., 8 Ida. 230, 238, 67 Pac. 656.

A very full review of the authorities on this subject will be found in Brown vs. Western Md. Ry. Co. (W. Va.), 99 S. E. 457, 4 A. L. R. 522.

We have merely cited these authorities to show that this is not a case in which the Court should deny specific performance if that question were properly before it.

The contract in question contains all the essential elements of a binding contract. The parties were competent to contract, The subject-matter and the consideration are within the law. It is axiomatic that the mere fact that a contract is incapable of being specifically enforced, even if that question were before the Court, cannot affect its validity or binding effect. The rule is concisely stated in 25 R. C. L.,p. 205, as follows:,

> "In refusing specific performance of a contract the decision is limited to the question of its enforceability in equity, leaving open the inquiry as to its binding effect at law. Accordingly, it is well settled that a Court of Equity may refuse specific performance of a contract, although at the same time it would refuse to set it aside."

It is unnecessary to cite authorities in support of this proposition.

The contract contains mutual covenants. Appellee showed due consideration for the rights of Appellant when he attempted to ascertain whether it would be convenient for Appellant to work and to furnish his share of the expense.

Appellee perhaps had the right to ignore Appellant's wishes as to when it would be convenient for the latter to commence work, but on the contrary he sought in every way to plan the work so as to meet Appellant's convenience and he should not be penalized for so doing. Appellant's letters clearly show that he was physically incapacitated to do his share of the work and was financially unable to bear his share of the expense during certain periods when Appellee was de-

sirous of working or putting a man in his place. At other times Appellant was disinclined for reasons which were neither real nor substantial. The plain truth of the matter is that Appellant in the summer and fall of 1920 conceived the idea of selling the property to the Banner Mining Company if he could eliminate Appellee from his contract. This proposed deal he did not disclose to Appellee, although the latter was in fact his partner, as the contract clearly shows they were to share both in the losses and the profits from the development of the property and the shipment of ore. As soon as Appellant thought he had Appellee in default, but without any notice to Appellee of his intention so to do, he enters into a contract to sell the property to the Banner Mining Company, and presumably this deal meant greater profit to Appellant. The record shows he never discussed this matter with his partner, but attempted to keep him entirely in the dark, at least until he thought he had him firmly eliminated from the contract.

Counsel for Appellant in a most ingenious way leads the discussion into the realm of sophistry and draws mental pictures of imaginary controversies over the uncertainties of the contract, and then shifts quickly to the inability of the Court to grant specific performance because of such uncertainties, and then concludes that the contract is *void because the Court cannot grant specific performance.*

There was never any controversy between Appellant and Appellee over the meaning of the contract. To them it was perfectly clear. They knew exactly what it meant. They were practical miners and they had

used mining terms—terms with which they were entirely familiar, and their correspondence shows, as does their testimony, that there was no delay because of imperfect or incomplete specifications in the contract. The work to be done is described in sufficient detail for any practical miner (Rec., p. 16). Appellant represented, and it is unquestionably a fact, that in the main tunnel on the property there was already a shaft or winz 50 feet deep. The new work was to start at the bottom of that shaft, and it was agreed that: (a) "said shaft shall be sunk 50 feet so as to make a level at a distance of 100 feet below the present main tunnel"; (b) from the bottom of this shaft on the new level 100 feet below the old tunnel, "a tunnel shall be cross cut to the vein". All practical miners understand just what that means; and (c) after striking the vein "said parties shall drift upon this vein for 50 feet each way from the cross cut", and this being done, (d) "said shaft or winz shall then be sunk 100 feet", and (e) at this point "another cross cut shall be run from such point to the vein", and (f) having struck the vein the parties shall drift "50 feet each way from said cross-cut."

As stated before, the parties themselves had no misunderstanding or controversy over where or how the work was to be done. By way of illustration we simply refer to one letter of Appellant written a year and a half after the contract was executed (Rec., p. 36), in which he says: "I am of the same opinion as you are in regard to working these claims." And in February, 1920, Appellee writes (Rec., p. 39): "I will help you so we will be able to get along some way and develop the claims * * * I will buy what machinery we

need to do this work. And you can pay your part later on. We can fix that part so you will not have to worry. I will not take any advantage of you, on the other hand I will do all I can to help you" * * *. And so throughout the correspondence there is manifested a fine sense of honor and good faith on the part of Appellee—a desire to help appellant to bear his share of the expense by advancing the money for the machinery and other expenses, but there is no evidence whatever of any misunderstanding as to where the work was to be done, or the amount of work, or the kind or character of work. As to such matters, as said by the Supreme Court of Idaho in Lane vs. Pacific Etc. Railway Co., 8 Idaho 230, the law implies that it will be done in the usual manner and that it shall be effectual to the use for which it is designed.

It would be manifestly absurd to make the specifications so in detail that nothing would be left to common sense and to the rule of common usage and custom. Counsel might as well argue that the contract is uncertain because it does not state at what hour in the morning both parties shall commence work, or the time they shall lay off for lunch, or whether they shall work on day shifts or night shifts, and that, hence, the contract cannot be carried out because they may not both agree to work during the same shifts, or that they may both insist on working in the same place at the same time. Under this agreement the parties became in effect partners in this property and each agreed to do his share, and, among other things, they agreed (Rec., p. 17), "That any ore of sufficient value shall be disposed of in such manner as shall seem most advan-

tageous to both parties, and the net receipts thereof shall be credited one-half to each of the parties hereto."

What was said by this Court in Whitney vs. Dewey, 158 Fed. 385, applies to the conduct of the Appellant in this case in secretly attempting to sell the property to the Banner Mining Company without notifying Appellee. This Court said:

> "There are some principles which are thoroughly well established that bear upon the case, and will furnish grounds of equity and law upon which our decision must be based. The first and highest duty which partners owe to each other is perfect good faith. Each is under obligation to do what he can to promote the success of the partnership. In every purchase or bargain each is under a duty to use the property of the concern for the benefit of all. In the requirement of good faith between partners, naturally, deceit, concealment, and false representations are forbidden."

We deem it unnecessary to consider individually or separately the cases cited in Appellant's brief. We have no particular quarrel with the law as announced in those cases. But counsel has attempted to apply—them to a state of facts to which the Court that rendered the decisions never intended they should be applied. Neither do we deem it necessary to discuss the fine-spun theories advanced by counsel to show that under the contract in question Appellee acquired no rights whatever of which a Court of Equity can take cognizance.

It might well be asked, why did Appellant bring a suit to quiet title if the contract is so absolutely ineffectual to vest any right in Appellee to this property? We shall quote from some of the authorities merely to show the practical view which Courts take of these contracts as contra-distinguished from the metaphysical theories by which counsel for Appellant disposes of the contract and the rights of Appellee.

Pomeroy in his work on Equity Jurisprudence, Secs. 1260-1261, 4th Ed., discusses the underlying principles of contracts such as the one now before the Court. In the note to these sections, after quoting from a number of the English and American authorities, he says:

> "These extracts show that the ablest judges have found it very difficult to formulate a statement which should exactly reconcile the idea of vendor having merely a lien with the notion of his being a trustee. In the recent case of Lysaght vs. Edwards, L. R. 2 Ch. Div. 499, 506, 507, Sir George Jessel, M. R., states the effect of a contract for the sale of land as follows: 'It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Harwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor hav-

ing a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, the possession of the estate, and a charge upon the estate for his purchase money. Their positions are analagous in another way. The unpaid mortgagee has a right to foreclose,—that is to say, he has the right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate', and in default of payment he becomes absolute owner of it. So although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, 'Either pay me the purchase money or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity; and if the time expires without the money being paid, the contract is canceled by the decree of judgment of the Court, and the vendor becomes again the owner of the estate (i. e., equitable as well as legal owner). But that, as it appears to me, is a totally different thing from the contract being canceled, because

there was some equitable ground for setting it aside. The judge goes on to discuss the meaning of 'valid contract' for the sale of land, when such contract is valid and binding, and then proceeds: 'Being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser. If it is a house that is sold, and the house is burned down, the purchaser loses the house. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and *more* than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject, of course, to his right to be paid the purchase money and his right to enforce his security against the estate.' See also Morgan vs. Swansea etc. Authority, L. R. 9 Ch. Div. 582, 584. To these admirable expositions nothing need be added

by way of comment. They show that the notion of the vendor's lien is simply another mode of expressing the settled doctrine of conversion wrought by a contract for the sale of land. In equity the vendee is regarded as the real beneficial owner, *even though he has not paid the purchase price*; the vendor holds the legal estate as trustee, and when the terms of the contract are complied with, he is bound to convey. Until those terms are complied with, the legal title remains in the vendor as his security; or, as it is otherwise expressed, he has a lien upon the vendee's equitable estate as security for payment of the purchase money according to the terms of the agreement. Practically, this lien consists in the vendor's right to enforce payment of the price, by a suit in equity against the vendee's equitable estate in the land, instead of by means of an ordinary action at law to recover the debt." (Our italics.)

In 27 R. C. L. 464, under the title "Purchaser's Interest as Viewed in Equity; Rule Stated", the author says:

"In equity the purchaser is regarded as the owner subject to the liability for the unpaid price and the vendor as holding the legal title in trust for him. This view of the estate of the purchaser is based on the maxim that equity regards and treats as done, what, in good conscience, ought to be done."

A long list of authorities is cited in support of the text, including Lewis vs. Hawkins, 90 U. S. 119, 23 L. Ed. 113.

The Circuit Court of appeals for the Eighth Circuit in Watts vs. Kellar, 56 Fed. 1, in directing specific performance of an option contract, says:

> "An option to sell land is as valid as an option to buy. When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed, and pay the price. Such contracts are perfectly valid, and it is now well settled that a Court of Equity may decree a specific performance of them. * * * Cases may be found which hold that such contracts will not be specifically enforced, because the right to a specific enforcement is not mutual. The want of mutuality of right to a specific performance of a contract, which sometimes precludes its enforcement in equity, has no application to an option contract of the character we are considering. The purchaser of an option to buy or sell land pays for the privilege of his election. It is that very privilege which the other party to the contract sells * * * An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right

to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value, no man of any experience in the law would esteem an option or a law suit for an uncertain measure of damages as of any value."

The same Court, in Baker vs. Mulrooney, 265 Fed. 529, enforced an option for the purchase of mining stock for which no consideration was paid and in which Mulrooney had agreed to sell to Baker his stock for $180,321, and Baker, before the option expired, resold the stock at a profit of $161,554. The Court considers at length the status of options and the duty of the Court to protect the rights of parties under option contracts. The Court says:

"The liability of Baker to take the stock under the Mulrooney option was immaterial. He did not agree to take it in the option, yet he had the right to take it if he so desired under its terms. So that it cannot be said that Baker was playing fast and loose with Mulrooney * * *. It is also immaterial, so far as the validity of the option is concerned, whether Baker was a millionaire or was insolvent. * * * In the commercial world these options are taken as a general rule by men who have not the money to pay for the property sold, but intend to make it by a re-

> sale. * * * Baker was doing nothing but what he had a legal right to do. That he made a large profit has nothing to do with the case, except it no doubt was the cause of this law suit."

To the same effect is Conley Camera Co. vs. Multiscope & Film Co., decided by the same Court, 216 Fed. 892.

The Supreme Court of North Dakota, in Horgan vs. Russell, 140 N. W. 99, 43 L. R. A. (N. S.) 1150, reviews at length the authorities on the question of specific performance of option contracts for the purchase of real estate. The Court says:

> "Defendant contends that the option, unaccepted at the time of the sale, amounted only to a mere offer to contract, and passed no right to make subsequent acceptance, or to the land itself; that the offer was wholly executory and prospective, and could not amount to a right or interest in the land enforceable in equity. This appears plausible, but it does not have the support of authority. This is well summarized in Smith vs. Bangham, 156 Cal. 359, from page 365, 28 L. R. A. (N. S.) 522, 104 Pac. 689, of which we quote, concerning the said question: 'It has been said that an option to purchase the land does not, before acceptance, vest in the holder of the option an interest in the land. Richardson vs. Hardwick, 106 U. S. 252, 27 L. Ed. 145, 1 Sup. Ct. Rep. 213; Gustin vs. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; Phoenix Ins. Co. vs. Kerr, 66 L. R. A. 569, 64 C. C. A. 251, 129 Fed.

723. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase, constitutes the grantee the equitable owner of an interest in the property. House vs. Jackson, 24 Ore. 89, 32 Pac. 1027; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526; Telford vs. Frost, 76 Wis. 172, 44 N. W. 835; Wall vs. Minneapolis, St. P. & S. Ste. M. R. Co., 86 Wis. 48, 56 N. W. 367. At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land, and when accepted entitles him to call for specific performance. Hawralty vs. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526; People's Street R. Co. vs. Spencer, 156 Pa. 85, 36 Am. St. Rep. 22, 27 Atl. 113; Guyer vs. Warren, 175 Ill. 328, 51 N. E. 580. Such right, when exercised, must necessarily relate back to the time of giving the option (People's Street R. Co. vs. Spencer, supra), so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase. Barrett vs. McAllister, 33 W. Va. 738, 11 S. E. 220; Sizer vs. Clark, 116 Wis. 534, 93 N. W. 539; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526.' To which we may add the note to Smith vs. Bangham, supra, also reported in 156 Cal. 359, 104 Pac. 689, found in 28 L. R. A. (N. S.) at page 522; Cummins vs. Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas.

986 and note; and 39 Cyc. 1244, reading: 'It has been held that acceptance of an option takes effect on the date of the acceptance, and binds the party only to the conveyance of the property in its present condition. On the other hand, it is held that acceptance of an option and performance of the conditions entitle the holder of the option to call for performance as of the date of the giving the option, so as to cut off intervening rights acquired with knowledge of the existence of the option'—citing authority. And the cases cited above as to the contrary are really not opposed to these principles. Richardson vs. Hardwick, 106 U. S. 252, 27 L. Ed. 145, 1 Sup. Ct. Rep. 213, holds merely that a written option never accepted, and never amounting to a contract, creates no interest in real property."

The Supreme Court of California, in Smith vs. Bangham, 156 Cal. 359, 104. Pac 689, 28 L. R. A. (N. S.) 522, had before it the question of specific performance of an option to purchase. The Court says:

"The agreement signed by the parties on December 26, 1905, was a unilateral agreement, of the kind usually known as an option. By its terms Smith was under no obligation to purchase the land or to pay for it. He was granted the right or privilege of purchasing upon certain terms, within a given time. Until he should have exercised this option he was in no way bound by the agreement. His election to accept and exercise the option within the time limited was, however,

sufficient to bind him and to remove any objection to the enforcement of the contract on the ground of want of mutuality. Hall vs. Center, 40 Cal. 63; Ballard vs. Carr, 48 Cal. 74; Calanchini vs. Branstetter, 84 Cal. 249, 24 Pac. 149; Thurber vs. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Sayward vs. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; House vs. Jackson, 24 Ore. 89, 32 Pac. 1027. The option had at least the force of an offer to sell, and the acceptance of this offer before it had expired or had been revoked constituted a valid and binding contract, from which neither party could recede. 29 Am. & Eng. Enc. Law, 2d ed., p. 601; Vassault vs. Edwards, 43 Cal. 458; Benson vs. Shotwell, 87 Cal. 49, 25 Pac. 249. * * *

"It has been said that an option to purchase land does not, before acceptance, vest in the holder of the option an interest in the land. Richardson vs. Hardwick, 106 U. S. 252, 27 L. Ed. 145, 1 Sup. Ct. Rep. 213; Gustin vs. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; Phoenix Ins. Co. vs. Kerr, 66 L. R. A. 569, 64 C. C. A. 251, 129 Fed. 723. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase, constitutes the grantee the equitable owner of an interest in the property. House vs. Jackson, supra; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526; Telford vs. Frost, 76 Wis. 172, 44 N. W. 835; Wall vs. Minneapolis, St. P. & S. Ste. M. R. Co., 86 Wis. 48, 56 N. W. 367. At any rate the option

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The Supreme Court of Oregon in House vs. Jackson, 24 Ore. 89, 32 Pac. 1027, in enforcing specific performance of an option contract, says:

"The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a Court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed, and when an agreement has been made for the sale of lands the vendor is deemed the trustee of the purchaser of the estate sold; and the purchaser, trustee of the purchase money for the vendor. The vendee in equity is

actually seized of the estate, and as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser. Kerr vs. Day, 14 Pa. St. 112. Haley had an estate in the premises and was equitably the owner thereof, and could transfer this right, and his assignee can enforce the option to the same extent as his assignor."

The Supreme Court of Alabama, in Morton vs. Allen, 180 Ala. 279, 60 So. 866, L. R. A. 1916 B 11, in answering the contention that specific performance should not be decreed unless the contract was fair and based upon an adequate consideration, says:

> "When two people who possess the legal capacity to contract actually make contract, if the contract is not tainted with fraud and does not contravene public policy, it is the duty of a Court of Equity, if its powers are properly invoked for that purpose, to enforce the contract in accordance with its terms."

The Supreme Court of Illinois in Ullsperger vs. Meyer, 217 Ill. 262, 75 N. E. 482, 2. L. R. A. (N. S) 221, in reversing the Trial Court and directing specific performance of the contract and in answer to the contention that the consideration was inadequate, says:

> "The contention that the sum of $14,000 was an inadequate consideration, and that specific performance was properly refused for that reason, we regard as untenable. The consideration was

that agreed upon between the parties, as shown by the contract, and the allegations of the bill * * * Mere inadequacy of consideration, if agreed upon by the parties without fraud, would not be sufficient to defeat a decree for specific performance. The owner of the property has the right to sell it, or contract to sell it, for such price as he sees fit and is satisfied to fix; and if he does sell or agrees to sell for a valuable consideration, although it may be inadequate, and no advantage was taken of him or the consideration fixed through fraud or misrepresentation, he cannot, when he finds that the property is worth more than he agreed to take or sell for, rescind the sale or refuse to perform.

"It is urged that this contract lacks in the material element of mutuality. The particular ground upon which this contention is based is that the contract is signed by appellee only. It is found in option contracts and unilateral contracts generally that the rule here contended for has no application. That the mere verbal acceptance by the second party to the contract, or the vendee, or the person holding the option, with notice thereof to the vendor, and an offer to perform, renders the contract mutual and binding."

It will be noted that the contract provides (Rec., p. 15):

"It is further agreed that the fiscal year for doing such work in the developing and opening up of said properties, shall begin on the first day

> of October of each year, *with the above reservations as to unforeseen and unavoidable contingencies,* and it is further agreed that at least six months of such work in so developing and opening up said properties shall be by said parties done during such fiscal year."

Manifestly, the above provision contemplated postponement of the work upon contingencies and hence does not make time the essence of the contract. In connection with this clause there should be read the other clause (Rec., p. 19) that:

> "It is further agreed between the parties hereunto that if the said Long shall, *after proper demand by said Daly,* default in any one or more of the provisions of this contract by him hereby agreed to be observed and performed," etc.

Clearly, this contract contemplated that before default could be declared there should be "proper demand by said Daly" made upon Long to perform the work. No such demand was ever made, and it is not contended by counsel that any such notice or demand was ever given. On the contrary, there was a clear waiver by Appellant and acquiescence in the postponement.

Counsel is wrong in his argument on the law of waiver. The rule which he contends for is limited to cases where the waiver happens to be one of the consequences of estoppel. In 27 R. C. L., p. 905, this distinction is pointed out:

> "The terms 'estoppel' and 'waiver' are sometimes loosely used interchangeably, but though a

> waiver may be in the nature of an estoppel and maintained on similar principles, they are not convertible terms, and the distinction between them is one easy to preserve when express waivers are under consideration. As already seen, a waiver is an intentional relinquishment, while the indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance on that representation."

See also the very full discussion of this subject in 5, Page on Contracts (2d Ed.), p. 4672. See also 5, Page on Contracts, Sec. 2970, as to the necessity of Appellant tendering performance on his part before he can place Appellee in default.

The Supreme Court of Oregon, in Graham vs. Merchant, 43 Ore. 294, 72 Pac. 1088, considered the question of waiver of strict performance in a contract where time was expressly declared to be of the essence of the contract. The Court says:

> "A forfeiture clause is inserted in a contract to convey real property for the advantage of the vendor, and, as a competent party may waive any provision that is beneficial to him, a mere option to declare a forfeiture is not self-executive and hence does not become operative until exercised. (Citing authorities). When a vendor abandons his contract to convey, the vendee, in his choice of remedies, may elect to rescind the contract, and thereupon maintain an action at law to re-

cover what he has paid thereon, as money had and received. (Citing authorities). This theory was adopted by plaintiff's counsel, who maintained that if the money received by the defendant after March 15, 1899, was accepted by him as a payment on the purchase price of the land, *he could not thereafter declare a forfeiture, except upon a demand and notice,* and, this being so, no error was committed in refusing to give the instruction requested. * * * It remains to be seen whether, after such election, he could rescind the contract without giving notice. 'The law,' says Mr. Justice Wood in Higby vs. Whittaker, 8 O. 198, 'requires some positive act by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives reasonable time to comply; but it requires eagerness, promptitude, ability and disposition to perform, by him who would resist a rescission of his contract.' In Mullin vs. Bloomer, 11 Ia. 360, it is held that a vendee cannot rescind his contract for the conveyance of real estate without the performance of some act which will give the vendor notice of his intention and put him on his guard * * *. In Watson vs. White, 152 Ill. 364, 38 N. E. 902, it was held, that *where time is stated to be of the essence of a contract to convey land, if both parties, by mutual course of conduct, treat the time clause as waived or suspended, one of them cannot suddenly insist upon forfeiture, but must, in order then to avail himself of the time clause, give reasonable, definite, and specific notice of his changed*

intention. When a vendor waives the stipulation of a contract prescribing the time of its performance, he cannot rescind without giving the vendee reasonable notice to comply with his part of the agreement" (citing authorities).

The record fully justifies the conclusion of the learned Judge that:

> "To say the least the conduct and attitude of the plaintiff in respect to proceeding with the prospect were equivocal. There is no clear expression of a desire upon his part that defendant should go ahead, and thus incur expenses which both parties must under the terms of the agreement share * * * At times he made it clear that he did not feel financially able to contribute, and hence was unwilling that anything be done. It may very well be that the defendant was in doubt as to his wishes, and it may further very well be that had he unequivocally expressed a desire that the contract plan be carried out, the defendant would have met the demand. Upon the whole, I do not feel warranted in finding that the defendant forfeited his right."

Wherefore, we respectfully submit that the decision of the District Court should be affirmed.

Respectfully submitted,

RICHARDS & HAGA,
Solicitors for Appellee,
Residence: Boise, Idaho.

No. 3989

United States

Circuit Court of Appeals

For the Ninth Circuit.

EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von HOLT, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

Transcript of Record.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Let process issue as prayed for.

(Sgd.) J. T. DE BOLT,
Judge, Circuit Court, 1st Circuit.

Dated Aug. 7, 1919.

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERICK GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Petition.

To the Presiding Judge of the Circuit Court of the First Circuit, Sitting at Chambers in Equity:

Your petitioners, H. Focke and H. M. von Holt, both of the City and County of Honolulu, Territory of Hawaii, trustees under the will and of the estate of James Gay, late of Mokuleia, Waialua, in the said City and County of Honolulu, deceased, respectfully represent to your Honor as follows:

1.

That the said James Gay duly made and published his last will and testament in writing on the 25th day of May, 1893; that a copy of the said will is hereto attached, and your petitioners hereinafter called the "complainants," beg leave to refer to the original thereof on the hearing of this their petition; [1*]

2.

That the said James Gay thereafter, to wit, on the 28th day of May, 1893, died without altering or revoking his said will; that the said will was on the 11th day of July, 1893, duly proved in the proper court of said Territory; that on the last-named date letters testamentary under the said will were duly issued to the complainant, H. Focke, and one Mary Ellen Gay, late of said Mokuleia, deceased, widow of said James Gay, and the said H. Focke and Mary Ellen Gay thereupon took upon

*Page-number appearing at foot of page of original certified Transcript of Record.

themselves the execution of the said will and by virtue thereof possessed themselves of all of the personal estate of the said testator, which was more than sufficient to answer and satisfy all his just debts and funeral and testamentary expenses; that the said Mary Ellen Gay died on, to wit, the 5th day of April, 1895, and that on the 20th day of December, 1895, the accounts of the said H. Focke, the surviving executor of the estate, were approved and the administration of the estate closed;

3.

That in and by the said will the said H. Focke and the said Mary Ellen Gay were nominated and appointed the trustees thereunder; and after the death of the said Mary Ellen Gay and on, to wit, May 20, 1895, one Cecil Brown, late of said Honolulu, deceased, was duly appointed a cotrustee of the said estate with the said H. Focke in the place and stead of the said Mary Ellen Gay, and thereafter and up to the 29th day of June, 1915—when the resignation of the said Cecil Brown as such trustee was accepted—the said H. Focke and Cecil Brown were the duly appointed, qualified and acting trustees under the said will; that on June 29, 1915, the complainant H. M. von Holt was duly appointed a cotrustee of the said estate. [2]

4.

That at the time of his death the testator was possessed of, interested in and entitled unto considerable personal estate, and of no freehold estate whatsoever, and that at the inception of the trust created in and by his said will the said personal

estate was of a value as shown by the inventory of the executors of Twenty Thousand Dollars ($20,000.00) or thereabouts and consisted of:

(a) A leasehold from one J. P. Mendonca dated the 27th day of May, 1884, for the term of fifty (50) years of a certain tract of land situated at said Mokuleia, held, owned and controlled by the said J. P. Mendonca—the said leasehold being hereinafter referred to and called the "Mokuleia" lease or leasehold—of the term of which leasehold there was at the time of the testator's death an unexpired residue of forty-one (41) years or thereabouts.

(b) A herd of cattle, horses and other livestock and certain farm, dairy and household effects running, situate and being on said "Mokuleia" leasehold; and

(c) A certain leasehold (hereinafter referred to and called the "Ookala" lease or leasehold) held by the testator from the Commissioners of Crown Lands of the Government of Hawaii under date of March 1, 1876, the said lease comprising the Ahupuaa of Humuula and being for the term of twenty-five (25) years from that date and a subsequent extension thereof for an additional term of seven (7) years, and as to which lease the said James Gay had disposed of all his rights thereunder except as regards that portion of the said Ahupuaa which was subleased [3] by him to the Ookala Sugar Plantation Company, Limited, under date of June 17, 1881—the rental reserved in said sublease being a percentage of the sugar, or the

process thereof, grown by said Ookala Sugar Plantation Company, Limited, on said land so subleased; that the residue of the term of said sublease was at the death of the testator some seven (7) years, and the term thereof was thereafter extended by the trustees to the 1st day of February, 1908.

5.

That in and by the said will all of the estate of the testator was bequeathed unto the trustees therein named upon trust to pay the rents, income, issues and profits arising therefrom to the said Mary Ellen Gay for the term of her natural life, and the said trustees were directed in and by the said will from and after the death of the said Mary Ellen Gay to pay one-half (½) of the said rents, income, issues and profits for the support, maintenance and education of Llewellyn Napela Gay, Reginald Eric Gay, and Arthur Francis Gay, sons of the testator, share and share alike, and one-half (½) of the said rents, income, issues and profits for the support, maintenance and education of Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, daughters of the testator, share and share alike, and said trustees were directed in and by the said will from and after the death of all of his said children to convey one-half (½) of the trust estate and all additions or increase thereto unto the children of the testator's sons above named, share and share alike—the child or children of any deceased child taking the parent's share—and to convey the remaining portion of the trust estate and all additions or increase

thereof unto the children of the testator's daughters above named, share and share alike—the [4] child or children of any deceased child taking the parent's share.

6.

That in and by the said will the testator expressed his wish and directed that the said trustees, or their successors, should manage, conduct and carry on the business of ranching and stock-raising at said Mokuleia, so long as the same could be done profitably and without loss; and that in and by the said will the said trustees, or their successors, were empowered to sell and convey the testator's property at Mokuleia at any time when in their discretion they should think that a sale of all said property at said Mokuleia would, by reinvestment of the money realized upon such sale, be beneficial and inure to the benefit of or increase the trust estate created under the said will.

7.

That up to the time of his death and for many years prior thereto the testator was and had been residing on the said Mokuleia leasehold and was and for many years had been conducting and carrying on the business of a rancher and stock-raiser on the larger portion thereof and was and had been using in connection with his said ranch and cattle business and as a part thereof the said herd of cattle, horses and other livestock and the farm, dairy and household effects above referred to, and was at the time of his death subletting and for many years prior thereto had sublet to divers ten-

ants small portions of the said Mokuleia leasehold for the purpose of growing rice and other agricultural products thereon; and that at the time of his death and for many years prior thereto the income of the testator was derived solely from his said ranch and cattle business at Mokuleia, the rentals [5] paid to him by the several sublessees of the said Mokuleia leasehold, and the rentals paid to him by the said Ookala Sugar Plantation Company, Limited, under the sublease hereinabove referred to and described.

8.

That the complainants, trustees as aforesaid, and their successors in trust, pursuant to the directions in the said will contained, carried on the testator's business of ranching and stock-raising at said Mokuleia until on or about the 9th day of December, 1898, when, with the consent of the then Judge of this court, a portion of the said Mokuleia leasehold containing an area of eight hundred (800) acres or thereabouts was leased by the then trustees to one B. F. Dillingham for the balance of the term of the said Mokuleia leasehold at a rental of five per cent (5%) of the sugar, or the proceeds thereof, grown thereon; that the said lease to the said B. F. Dillingham was thereafter assigned to the Waialua Agricultural Company, Limited, which company now holds the lands thereby demised together with an additional area of some sixty-five (65) acres leased to it directly by the trustees on the 2d day of July, 1902; that the trustees continued to carry on the said business of ranching and stock-

raising on the rest of the said Mokuleia leasehold until the 28th day of April, 1906, when with the consent of the then Judge of this court the rest of the land covered by the said Mokuleia lease was sublet and is now being sublet to third persons for the residue of the term of said Mokuleia lease; that on said last-mentioned date the livestock, farm, dairy and household effects were sold by the then trustees for the sum of Four Thousand Seven Hundred and Thirty-five Dollars ($4,735.00), of which said last-named sum the then trustees of the estate [6] were directed by the said Court to retain the sum of Four Thousand Sixty-five Dollars ($4,065.00) as principal or capital of the testator's estate.

9.

That the said Ookala lease expired on the 1st day of February, 1908; that the said Mokuleia lease will expire on the 30th day of April, 1934; and that the income of the estate consists wholly of the rentals reserved in the various subleases made by the complainants and their predecessors in trust, and the income from the principal sum of Four Thousand Sixty-five Dollars ($4,065.00) above named or the securities in which the same has from time to time been invested.

10.

That the children of the testator now living and who are named as respondents herein (and are hereinafter referred to as "the life tenants") are as follows: Llewellyn Napela Gay, residing in Honolulu aforesaid; Reginald Eric Gay, residing in

Honolulu aforesaid; Arthur Francis Gay, residing in the City of San Francisco, California; Alice Mary K. Richardson, wife of Thomas Everett Richardson, residing in the City of Oakland, California; Helen Fanny Gay, residing at Corcoran, California, and Frida Gay, residing at San Jose, California, and that the other of the testator's children, namely, Ethel Gay, died, unmarried on or about the 18th day of July, 1902.

11.

That the grandchildren of the testator, being children of the testator's children named in the said will, who are now living and are named as respondents herein (and are hereinafter referred to as the "remaindermen"), are as follows: Eva Gay, a minor of the age of seventeen (17) years, and Beatrice Gay, a minor of the age of ten [7] years, daughters of Llewellyn Napela Gay and his wife Rea Jane Gay, residing in the City of San Francisco; Sonny James Mokuleia Gay, a minor; Michael Vanatta K. Gay, a minor, and Llewellyn Napela Gay, a minor, all residing in Honolulu aforesaid, children of Reginald Eric Gay; Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, all residing in the City of Oakland, California, children of Alice Mary K. Richardson.

12.

That at all times during their conduct and management of the testator's estate, the complainants, trustees as aforesaid, and their predecessors in trust, have paid all of the net rents, income, issues

and profits of the said estate, after paying the expenses of and incidental to the management of same, to the life tenants, and have made no provision thereout for the preservation of the capital or *corpus* of the said estate, by amortization or otherwise, save and except in so far as the sum of Four Thousand Sixty-five Dollars ($4,065.00) above referred to has been held and invested by them from time to time as capital of the said estate.

13.

That in their conduct and management of the said estate and in paying out all of the net rents, income, issues and profits of the same to the life tenants without making any provision for the preservation of the capital or *corpus* thereof the complainants, trustees as aforesaid, and their predecessors in trust were guided by the advice and instructions of the said Cecil Brown, deceased, who prepared the said will in accordance with the instructions of the testator, professed to know the testator's intentions in respect to the manner in which and the persons by whom his estate was to be enjoyed, and who [8] as above set forth acted as a trustee of the said estate for upwards of twenty years.

14.

That the complainants, trustees as aforesaid, have recently, to wit, within the last few months been advised by counsel that it is uncertain and doubtful from the language used in the will of the testator what the testator's intentions were as to the respective rights in his estate of the life ten-

ants and remaindermen and that it is a matter of uncertainty and doubt whether under the provisions of the said will and in view of the fact that the principal assets of the trust estate, namely, the said Mokuleia and Ookala leaseholds, were of a wasting and diminishing nature, the trustees of the said estate were authorized in the past or will be authorized (Copyist Error) (~~in the past will be authorized~~) in the future to pay out all the net rents, income issues and profits of the said estate to the life tenants without making provision out of said rents, income, issues and profits for the preservation of the *corpus* of the said estate for the benefit of the remaindermen, or whether there should not have been retained in the past and should not in the future be retained out of the said rents, income, issues and profits such sums as may be necessary for the purpose of restoring for the benefit of the remaindermen the capital or *corpus* of the said estate to the value thereof at the death of the testator.

15.

That the complainants, trustees as aforesaid, desire to carry out the wishes of the testator and to execute the trusts of the said will, and to the end that the doubts and uncertainties which have recently arisen may [9] be resolved they desire and are entitled to the instructions of the Court as to the relative rights of the life tenants and the remaindermen in the trust estate, and as to their duties in respect to the management of the said

estate under the said will, and the disposition of the rents, income, issues and profits thereof.

WHEREFORE THE COMPLAINANTS PRAY:

1. That the respondents may be summoned by publication or otherwise as the Court may direct to appear and answer all and singular the premises and set forth their respective claims and contentions as to the matters therein set forth, and be bound by the proceedings herein and by such order, direction and decree as to the Court may seem meet.

2. That a guardian *ad litem* may be appointed for said Eva Gay, Beatrice Gay, Sonny James Mokuleia Gay, Michael Vanatta K. Gay, Llewellyn Napela Gay, Albert Gay Harris, Walter William Holt, Alice K. Holt and Ethel Frida Holt, minors, to represent their interests herein.

3. That complainants may be instructed by this Honorable Court as to their duties in the execution of the trusts created by the testator in and by his said will; that all proper accounts may be taken, and all necessary directions given for carrying the testator's intentions into execution.

4. For costs and for such other, further an general relief as the nature of the case shall require, and to the Court shall seem meet.

And the complainants will ever pray, etc.

Dated: Honolulu, T. H., August 6th, 1919.

(Sgd.) H. FOCKE,

(Sgd.) H. M. von HOLT,

Trustees Under the Will and of the Estate of James Gay, Deceased.

W. L. STANLEY,

Counsel for Complainants. [10]

City and County of Honolulu,
Territory of Hawaii,—ss.

H. Focke, being duly sworn, upon oath deposes and says: That he is one of the complainants above named, and a trustee of the Estate of James Gay, deceased; that he has read the foregoing petition and knows the contents thereof and that all and singular the matters and things therein alleged are true to the best of his knowledge and belief.

(Sgd.) H. FOCKE.

Subscribed and sworn to before me this 6th day of August, 1919.

[Seal]

(Sgd.) SYLVIA LESLIE BRYANT,

Notary Public, First Judicial Circuit, Territory of Hawaii. [11]

(COPY)

Exhibit "A."

Know all men by these presents that I James Gay of Mokuleia, Waialua in the Island of Oahu being of sound and disposing mind and memory do make publish and declare this my last will and

testament, hereby revoking and making null and void all former wills by me made.

I hereby nominate and appoint my wife Mary Ellen Gay and my friend Hermann Focke to be the Executrix and Executor and also the Trustees of this my will, hereby directing my said executrix and executor to pay all my just debts and funeral expenses as soon as they can conveniently do so.

I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my estate real personal or mixed and wheresoever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said Trustees Hermann Focke or his successor in said trust to pay the rents, income, issues, and profits arising from and out of said Trust estate as follows: one half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike.

And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said [12] Trustee or his successor to convey one half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased child to take the parents share. And as to the remaining portion of said Trust estate and all additions or increase thereof, I direct my said Trustee or his successor in asid Trust to convey the same unto the children of my said daughters, Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, share and share alike, and the child or children of any deceased child to take the parents share.

And I direct my said Trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen to pay the share or portion of the income belonging to such child to the heirs that may survive such child dying.

In the event of the death, resignation or other incapacity of my said Trustees or either of them it is my wish that one of the Judges of the Circuit Court of the First Circuit of the Hawaiian Islands shall appoint a new Trustee or Trustees as the case may be in the place and stead of the one dying, resigning or becoming incapacitated, and the Trustee or Trustees so appointed shall have all the powers and authorities as if named herein.

It is my wish and I hereby direct that my said Trustees or their successors or successor, shall man-

age, conduct and carry on the business of ranching and stock-raising at Mokuleia on the Island of Oahu, so long as it can be done so profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of [13] all the property at said Mokuleia, would by reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this will.

And lastly I hereby direct that the executrix and executor and Trustees herein named shall serve as such without giving bonds.

In witness whereof I have hereunto set my hand and seal this 25th day of May A. D. 1893.

(Sig.) JAS. GAY. (Seal)

Signed, sealed, published and declared by the said James Gay as and for his last will and testament, in the presence of us, who in his presence, and in the presence of each other, and at his request, have hereunto set our names as witnesses this 25th day of May, 1893.

(Sig.) CECIL BROWN.
(Sig.) JOHN RICHARDSON.
(Sig.) THOS. WM. GAY. [14]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Appointing Guardian Ad Litem.

It appearing that the respondents Eva Gay, Beatrice Gay, Sonny James Mokuleia Gay, Michael Vanatta K. Gay, Llewellyn Napela Gay, Albert Gay Harris, Walter William Holt, Alice K. Holt, and Ethel Frida Holt are minors, and that a guardian

ad litem is necessary to represent them and their interests in the above-entitled suit:

IT IS HEREBY ORDERED that Harry Edmondson, Esquire, member of the bar of this court, be and he hereby is appointed guardian *ad litem* of said minors to defend the said suit in their behalf, and that he serve as such without bond.

Done at Chambers in Honolulu this 7th day of August, 1919.

[Seal] (Sgd.) J. T. DE BOLT,
Second Judge of Said Court Presiding at Chambers in Equity. [15]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS — IN EQUITY.

E. No. ——.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor,

MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Answer of Respondents Llewellyn N. Gay et al. (The "Life Tenants").

To the Presiding Judge of the Circuit Court of the First Judicial Circuit, Sitting at Chambers in Equity:

Now come the above-named respondents Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay, and Frida Gay, the now living children of James Gay, deceased (hereinafter also referred to as the "life tenants"), and for answer to the petition of the complainants in the above-entitled cause, as amended by the addition thereto of the record in the matter of the estate and trust under the will of said decedent of record in this court in Probate Case No. 2849, now say: [16]

1.

These respondents admit the several matters alleged and set forth in all of the paragraphs numbered from and including paragraph 1 to and including paragraph 13 of said petition.

2.

Further answering said petition, and with particular reference to paragraphs 14 and 15, and to the prayer for instructions therein set forth, and

not only in conjunction with but independently of the allegations of said petition, these respondents say:

That the "Mokuleia" and "Ookala" leaseholds, so called in said petition, were taken and held by the testator in his lifetime, and were by his will transmitted to the trustees thereunder as part of his estate.

That the testator in fact contemplated that said lease, acquired and used by him in his lifetime, would be held as part of his estate under the trust created by his will; and that the testator must be presumed to have known that, by holding, the said leases would "wear away" and ultimately expire.

That it was the intent of the testator, apparent not only from the direct provisions of his will, but from all of the surrounding facts and circumstances, that all of the rents, income, issues and profits, arising from his trust estate under said will, should be paid to the life beneficiaries therein named, without diminution of any kind; and that the testator did not contemplate or intend, nor will the terms of said will permit, that any depreciation or change in the inherent value of said leaseholds (or either of them) by reason of their approaching expiration, should be charged to or borne by the life beneficiaries, or that their value, as "principal," should be preserved intact for the benefit of [17] the remaindermen by any deductions from the rents, income, issues or profits arising from the trust estate, or by any other form of amortization.

That the acts of the trustees, in disposing of the

livestock and discontinuing the operation of the ranching business on the demised premises, and making subleases of portions of the demised lands, have resulted in greater income and profit being derived from the trust estate, without any prejudice to the remaindermen by reason thereof.

That the administration of the trust estate, as heretofore carried on in the manner described in paragraphs 12 and 13 of said petition, has been proper and in accordance with law and the terms of said will and the intent of said testator, and should not be interrupted or altered.

WHEREFORE, these respondents, being the "life tenants" under said trust, pray that the method of administration of said trust estate by the trustees under said will, in all of the respects hereinbefore mentioned and referred to, may be approved by this Honorable Court, and that the complainants, as the present trustees under said will, and their successors in said trust, be instructed to continue, until the death of all of the testator's children (the life tenants aforesaid) to pay one-half of the said rents, income, issues and profits of the trust estate, including the realizations under said "Mokuleia" lease, for the support, maintenance and education of the sons of the testator, and the other one-half thereof for the support, maintenance and education of the daughters of the testator, without deduction or diminution of any kind to provide for keeping up or restoring any value of the *corpus* of the estate for the benefit of the grandchildren of the testator, by amortization or otherwise.

Dated: Honolulu, T. H. November 26th, 1919.
[18]

(Sgd.) REGINALD ERIC GAY.
LLEWELLYN NAPELA GAY.
ARTHUR FRANCIS GAY.
ALICE MARY K. RICHARDSON.
HELEN FANNY GAY.
FRIDA GAY.

By Their Attorneys,
(Sgd.) SMITH, WARREN & WHITNEY.

Territory of Hawaii,
City and County of Honolulu,—ss.

Reginald Eric Gay, being duly sworn, deposes and says that he is one of the respondents who are named as life tenants in the foregoing answer and that he makes this affidavit on behalf of himself and the others of said life tenant respondents; that he has read the said answer and knows the contents thereof and that the matters and things therein set forth are true to the best of his information and belief.

(Sgd.) REGINALD ERIC GAY.

Subscribed and sworn to before me this 26th day of November, 1919.

[Seal] (Sgd.) ALBERTA BUDD,
Notary Public, First Judicial Circuit, Territory of Hawaii.

We hereby acknowledge receipt of a copy, each of the foregoing answer; this 28th day of November, 1919.

(Sgd.) W. L. STANLEY,
Attorney for Complainants.
(Sgd.) H. EDMONDSON,
Guardian *Ad Litem* of Minor Respondents.

[Endorsed]: E. 2252. 3/1. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al. Respondents. Answer of Respondents. Filed at 10:20 o'clock A. M. Nov. 28, 1919. (S.) B. N. Kahalepuna, Clerk. Smith, Warren & Whitney, Attorneys at Law, Bank of Hawaii Building, Honolulu, T. H. [19]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS — IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN

FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Amended Answer of the Minor Respondents Above Named.

Now come the minor respondents above named by Harry Edmondson, their guardian *ad litem,* and for amended answer to the petition filed herein allege as follows:

1.

That the said respondents admit the allegations contained in paragraphs 1, 2 and 3 of the said petition.

2.

In answer to paragraph 4 of the said petition the said respondents admit that at the time of his death, James Gay, the testator named in said petition, was possessed of, interested in and entitled unto considerable personal estate, but said respondents have no knowledge or information sufficient to form a belief that [20] the said testator was not possessed of, interested in or entitled unto some freehold estate, and leave the allegations thereof to be proven by the complainants above named, as they may be able so to do.

3.

In further aswer to paragraph 4 of the said petition the said respondents allege that they may have no knowledge or information sufficient to form a belief that at the inception of the trust created in and by the will of the said testator, his personal estate was of a value of $20,000.00, and leave the allegations thereof to be proven by the said complainants. Said respondents admit each and every other allegation contained in paragraph 4 of the said petition.

4.

Said respondents admit the allegations contained in paragraphs 5 and 6 of the said petition.

5.

In answer to the allegations contained in paragraph 7 of the said petition, said respondents allege that they have no knowledge or information sufficient to form a belief of any or all of the allegations therein contained, but leave the same to be proven by the said complainants.

6.

Said respondents admit the allegations contained in paragraphs 8, 9, 10, 11 and 12 of the said petition.

7.

In answer to paragraph 13 of the said petition, the said respondents allege that if the said complainants and their predecessors in trust were guided by the advice and instructions of one Cecil Brown named in the said petition in paying out all of the net rents, income, issues and profits of

the estate mentioned in said [21] petition, to the life tenants mentioned in said petition without making any provision for the preservation of the capital or *corpus* of the said estate, they are not relieved from the duty, responsibility and liability of executing the trusts in said will contained, according to the terms thereof, and according to law.

8.

In further answer to paragraph 13 of the said petition, said respondents allege that they have no knowledge or information sufficient to form a belief that the said Cecil Brown prepared the said will of the said testator either in accordance with the instructions of the said testator, or at all, or that the said Cecil Brown professed to know or did know the testator's intentions in respect to the manner in which, and the persons by whom his estate was to be enjoyed, and leave complainants to the proof thereof. Said respondents allege that all the allegations contained in paragraph 13 of the said petition are irrelevant and immaterial.

9.

In reply to paragraph 14 of the said petition, said respondents are informed and believe and allege the fact to be that there is no uncertainty or doubt under the provisions of the said will that the principal assets of the trust estate, namely the said Mokuleia leaseholds are of a wasting and diminishing nature, and allege that the complainants, the trustees of the same, were not after they ceased to conduct the testator's business of a rancher and stock-raiser, authorized by the said will to

pay out all of the said rents, income, issues and profits of the said estate to the life tenants, the respondents above named, other than the said minor respondents, without [22] making provision out of the said rents, income issues and profits for the preservation of the *corpus* of the said estate for the benefit of the said minor respondents. Said minor respondents allege that the said leaseholds and subleases thereof should have been sold, or there should have been retained in the past and should be retained in the future out of the said rents, income, issues and profits, such sums benefit of the said minor respondents the capital or *corpus* of the said estate to the value thereof.

10.

Said respondents are informed and believe, and allege the fact to be that the said leaseholds and subleases thereof were of great value at the date the same should have been sold, and are greatly in excess of that value now.

WHEREFORE THE SAID MINOR RESPONDENTS PRAY,

1. If it is impossible to ascertain the value of the leaseholds mentioned in the petition herein,

(a) That the trustees be instructed to take the value of the leaseholds at the date of the testator's death, and allow the life tenants 6% interest per annum thereon and accumulate the surplus for the benefit of the remainderman; or

(b) To wait until the expiration of the lease, then ascertain the sum which, if invested at 6% interest per annum with annual rests would equal

the total rents received on the subleases after deducting therefrom the total rent paid on the head lease, and treat that sum as *corpus,* and the balance as income; [23]

2. Or that the trustees be instructed to sell the leaseholds and treat the proceeds as *corpus* and invest the same at 6% interest for the benefit of the life tenants;

3. For such other and further relief as to this Court may seem meet; and

4. That this answer may be taken as a Joinder to the above named.

Dated, at Honolulu, T. H. January 23d, 1920.

(Sgd.) H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Said Minor Respondents.

Service of a copy hereof admitted this 6th April, 1920.

(Sgd.) HARRIET L. NOBLE.
W. L. STANLEY,
Attorney for Complainants.

Service of a copy hereof admitted this 6th April, 1920.

(Sgd.) SMITH & WARREN,
Attorneys for Respondents Life Tenants.

[Endorsed]: E. 2252. 3/1. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay et al., Respondents. Amended Answer of Minor Respon-

dents. Filed at 1:35 o'clock P. M. April 6, 1920. (S.) B. N. Kahalepuna, Clerk. H. Edmondson, Attorney-at-Law. Honolulu, T. H. Attorney for Minor Respondents. [24]

In the Circuit Court of the First Judicial Circuit Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Decision.

The complainants, H. Focke and H. M. von Holt, trustees under the will and of the estate of James Gay, deceased, on the 13th day of September, 1919,

filed a petition in this court praying that the Court instruct them concerning their duties in the execution of the trust created by the testator in and by his said will. On the 25th day of May, A. D. 1893, James Gay executed his last will and testament. Thereafter, on, to wit, the 28th day of May, 1893, the said James Gay died without altering or revoking the said will. On the 11th day of July, 1893, the said will was duly admitted to probate in the proper court in and for the Territory of Hawaii. On the last-named date, letters testamentary under the said will were duly issued to H. Focke and to Mary [25] Ellen Gay, the widow of the said James Gay. Thereafter on, to wit, the 5th day of April, 1895, the said Mary Ellen Gay died, and on, to wit, May 20, 1895, one Cecil Brown was duly appointed in her stead as cotrustee of the said estate with the said H. Focke. On the 29th day of June 1915, the said Cecil Brown resigned, as such trustee and his resignation was duly accepted. On the said 29th day of June, 1915, the complainant, H. M. von Holt, was duly appointed a cotrustee of the said estate, with the said H. Focke in the place and stead of the said Cecil Brown. The said H. M. von Holt and the said H. Focke were at the time of the filing of the petition herein and are now the duly appointed, qualified and acting trustees of the said estate. At the time of the death of the said James Gay he was possessed of certain property consisting of a leasehold from one J. P. Mendonca, dated the 27th day of May, 1884, for the term of fifty (50)

years a certain cattle, horses and other livestock and certain farm, dairy and household effects situate and being on said Mokuleia leasehold, and a certain leasehold from the Commissioners of Crown Lands of the Government of Hawaii, dated March 1, 1876, and being for the term of twenty-five (25) years from that date and a subsequent extension thereof for an additional term of seven (7) years. The lands described in the last named lease, comprised the Ahupuaa of Humuula, and were situate on the Island of Hawaii. At the time of filing the petition herein, this lease had expired and the estate of James Gay no longer had any interest therein and it need not be further considered. On the 28th day of April, 1906, the trustees of said estate, acting under the authority given them by said testator sold and disposed of the livestock, farm, dairy and household effects and the proceeds thereof were invested in accordance with the wishes of the said testator as expressed in his said will. [26]

The only part of the property owned by the said James Gay at the time of his death which is now in the possession of and under the control of the trustees of his estate, is the leasehold of the Mokuleia ranch which the said James Gay acquired from J. P. Mendonca. The said James Gay by his last will and testament devised and bequeathed unto Mary Ellen Gay and Hermann Focke all of his estate, real personal or mixed, upon the following terms and conditions: "I hereby give, devise and bequeath unto Mary Ellen

Gay and my friend Hermann Focke all my estate real personal or mixed and wheresoever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said Trustees Hermann Focke or his successor in said trust to pay the rents, income, issues, and profits arising from and out of said Trust estate as follows: one-half thereof for the support and maintenance of my sons Llewelly Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline E. Gay, Helen Fanny Gay, and Friday Gay, share and share alike.

"And from and after the death of all my children born of the body of my said wife Mary Ellen, I direct my said Trustee or his successor to convey one half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased [27] child to take the parents share. And as to the remaining portion of said Trust estate and all additions or

increase thereof, I direct my said Trustee or his successor in said Trust to convey the same unto the children of my said daughters, Alice Mary Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Friday Gay, share and share alike, and the child or children of any deceased child to take the parent's share.

"And I direct my said Trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen to pay the share or portion of the income belonging to such child to the heirs that may survive such child so dying.

"In the event of the death, resignation or other incapacity of my said Trustees or either of them it is my wish that one of the Judges of the Circuit Court of the First Circuit of Hawaiian Islands shall appoint a new Trustee or Trustees as the case may be in the place and stead of the one dying resigning or becoming incapacitated, and the Trustee or Trustees so appointed shall have all the powers and authorities as if named herein.

"It is my wish and I hereby direct that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Moluleia on the Island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale

of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this will." [28]

It will thus be seen that at the time James Gay made his will, he had in mind two classes of persons for whom he wished to make provision. The first class was composed of his wife and children, all of whom were living at the time of his death and who were the objects of his immediate concern. The second class was composed of his grandchildren who had not yet come into being, and whose interest in his estate was made entirely conditional. Of the first class there are now living Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Gay, Helen Fanny Gay, and Frida Gay, all of whom are the children of the said James Gay. Of the second class there are now living, Eva Gay, Beatrice Gay, Sonney James Mokuleia Gay, Michael Vanatta K. Gay, Llewellyn Napela Gay, Albert Gay Harris, Walter William Holt, Alice K. Holt, and Ethel Frida Holt, all of whom are the grandchildren of the said James Gay. The will directs the trustees to pay, after the death of Mary Ellen Gay, the rents, income, issues and profits arising out of the estate, to the enumerated children of the testator, in designated proportions. Thus was created in them a life tenancy and they thereby became entitled to the bequests made for their benefit. Anticipating that these life tenants might have issue and desiring

to dispose of the *corpus* of his estate upon their death, the testator directed the trustees, after the happening of that event, to convey his estate to the children of his children in the proportions mentioned in the will. The grandchildren, therefore, of the testator, all of whom came into being subsequent to his death, are the remaindermen, and as such have a potential interest in the estate. The conflict precipitated by the filing of the petition, is between the life tenants and the remaindermen in which the trustees occupy a position of neutrality. In order to determine the controversy and correctly advise [29] the trustees, it is necessary to bear in mind that the only part of the James Gay estate now in the possession and under the control of the trustees, is the unexpired term of the leasehold on the Mokuleia property. This lease was procured by James Gay from one Mendonca, on May 27th, 1884, and its duration was fixed at fifty years. It will, therefore, expire on May 26, 1934. At the time it was executed and for sometime thereafter, the property conveyed was used as a stock ranch and was of comparatively small value. Latterly, however, the development of the sugar industry in Hawaii, and the adaptation of the land to such uses, has greatly increased its value, and at the present time, the income derived from it amounts to $25,887.00 annually. Heretofore the trustees have paid this income to the life tenants. Their right to do so under the will has, however, been questioned and they have very properly sought judicial advice.

It is contended by the remaindermen that in as much as they were given an estate in remainder by the testator in the property devised to the trustees, and in as much as the only remaining portion of the estate is the Mokuleia leasehold, and in as much as the value of this leasehold is constantly diminishing by the lapse of time and will probably expire and therefore be valueless before their interest attaches, it is the duty of the trustees to convert the leasehold into cash and invest the proceeds in some form of security that will remain intact for their ultimate benefit. The soundness of this contention must be determined by the terms of the will and the canons of testamentary construction.

It must be borne in mind that the property devised to the trustees and from the income of which they were directed to make provision for the life tenants, consisted entirely of the leaseholds heretofore mentioned. The value of these leaseholds was [30] not stable and enduring, but by their very nature became less valuable each year as the period of their expiration approached. It was established by the evidence, that at the time the will was made, and at the time of the death of the testator, the life tenants now living, were minors and without issue. So that when the testator directed his trustees to pay the rents, income and profits derivable from these leaseholds to his children and then directed them upon the death of all his children, to convey his estate to his grandchildren in the proportions designated by his will,

he must have had in mind the possibility that unless the character of the estate was changed, the sources from which his children were to be maintained would be exhausted during their lives, and there would be nothing left for his grandchildren.

If the testator had, therefore, intended to impose upon his trustees the absolute duty of preserving an estate for the benefit of his grandchildren, he would have directed them to convert the leaseholds of which he was possessed, into a more permanent form of investment. Instead of doing this, however, we find the following provision in his will. "It is my wish and I hereby direct that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Truste Estate created under this will, to sell and convey the said property at Mokuleia [31] free and barred of the Trust created by this will."

It was contended at the hearing, by the guardian *ad litem* for the remaindermen, that a direction by the testator to the trustees, nominated by him to pay to the life tenants the income, issues, rents and profits derivable from his estate, was not a devise

of the leaseholds themselves, to the life tenants, and that under the law it became the duty of the trustees to protect the interests of the remaindermen by disposing of the leaseholds while they were valuable and reinvesting the proceeds in more permanent securities. It was urged that while in the case of a devise of specific property for the life of the devises, with remainder over to another, there is no duty imposed by law upon the life tenant to dispose of the property and reinvest the proceeds for the benefit of the remaindermen, even though it be of a depreciating nature, and its use by the life tenant might consume it entirely to the utter exclusion of the remaindermen, yet a different rule applies where the property is not identified, but described in general terms.

Many authorities were cited in support of this contention, and there is much reason for the doctrine they announce. It was no doubt this canon of testamentary construction which very properly influenced the trustees in seeking the advice of the Court, before proceeding further to execute the trust imposed upon them by the will of James Gay.

There are two reasons why this principle cannot prevail in the case now before the court. In the first place it is conceded that the only estate of which the testator died seized and possessed, were the Ookala leasehold, the Mokuleia leasehold and certain livestock and household furniture. A devise, therefore of all his estate was equivalent to a devise of each item *eo nomine.* If the will had identified each portion of the property devised,

there would be no basis for the contention of the [32] remaindermen. What difference can it make that the testator instead of doing this devised his estate as a whole when it is conceded that it consisted solely of the two leaseholds and certain personal property.

In the second place, it is clear from that part of the will last above quoted, that so far as the Mokuleia leasehold is concerned, it was the intention of the testator to leave it discretionary with the trustees, to sell it or continue to hold it for the benefit of the life tenants. This discretion is unlimited and it would be highly improper for the Court to substitute its judgment for that of the trustees, and thereby interfere with the will of the testator. In the event their judgment should dictate a sale of this leasehold, I am of the opinion, they would be obliged to devote the proceeds to some form of investment that would certainly enure to the benefit of the remaindermen. If, on the other hand, they continue to hold it, they should, in order to comply with the testator's wishes, pay the income, rents and profits to the life tenants.

[Seal] (Sgd.) JAS. J. BANKS,
Third Judge.

[Endorsements]: E. 2252. 3/1. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers—in Equity. H. Focke and H. M. von Holt Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al., Respondents. De-

cision. 35/161. Filed at 11:15 o'clock A. M., April 2, 1920. B. N. Kahalepuna, Clerk. [33]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Decree.

The complainants in the above-entitled cause, acting as trustees under the will and of the estate of James Gay deceased, having filed their petition on the 7th day of August, 1919, asking that they be

instructed by this Court as to their duties in the execution of the trusts under the will of said decedent and given all necessary instructions for carrying the testator's intentions into execution, after a determination by the Court of the issues presented by the pleadings herein;

AND upon the filing of said petition, the Court having duly appointed Harry Edmondson, Esq., as guardian *ad litem* of the above-named respondents, Eva Gay, Beatrice Gay, Sonny James Mokuleia Gay, Michael Vanatta K. Gay, [34] Llewellyn Napela Gay, Albert Gay Harris, Walter. William Holt, Alice K. Holt and Ethel Frida Holt who are minors; the remaining respondents (being life tenants under said will), being represented by L. J. Warren, Esq., of the firm of Smith, Warren & Whitney; and the complainants, as trustees as aforesaid, being represented by Wm. L. Stanley, Esq., as counsel;

AND the said cause having regularly come on for hearing before the undersigned judge of this Court, and with all of the parties represented as aforesaid and the said guardian *ad litem* acting as his own counsel; and the Court having now heard and fully considered all of the evidence adduced by the respective parties upon the issues involved herein; and having heard and considered the arguments of counsel thereon; and the Court having on the 2d day of April, 1920, rendered and filed its decision upon the issues aforesaid, holding that the intention of the testator expressed in said will was to give to the trustees under said will full

authority either to hold or to dispose of the said Mokuleia leasehold and interests incidental thereto, in their discretion, and that the exercise of such discretion ~~would~~ [J. J. B.] should not be interfered with by this Court;

NOW, THEREFORE, IT IS HEREY ORDERED, ADJUDGED AND DECREED, as follows:

(1) That the said complainants, as trustees under said will, be and they are hereby informed and instructed that by the terms and legal effect of said will they have been given and granted and now have the right and authority, in their discretion, to determine whether or not any sale or disposition of the said Mokuleia leasehold and property shall at any time or extent be made;

(2) That so long as the trustees shall continue to hold the property they are required by the terms and [35] legal effect of said will to pay the whole of the net rents, income, issues and profits arising therefrom (including the interest from the investment of the proceeds of sale of the property sold and the rents derived from the subleases of the land leased to the deceased by J. P. Mendonca), as follows: one-half thereof to the testator's sons, Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay, share and share alike, for their support and maintenance, the child or children of any of them who shall die to take the share of the deceased parent by right of representation, and the other one-half thereof to the testator's now living daughters, Alice Mary K.

Richardson, Helen Fanny Gay and Frida Gay, share and share alike (the other daughter, Ethel Pauline N. Gay, having died without issue), for their support, maintenance and any necessary education, the child or children of any of them who shall die to take the deceased parent's share by right of representation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the costs incurred in this proceeding be paid by said Trustees out of the income of the trust estate.

Done in open court this 6 day of April, 1920.

[Seal] (Sgd.) JAS. J. BANKS,
Third Judge, First Circuit, Sitting at Chambers in Equity.

Attest: (Sgd.) B. N. KAHALEPUNA,
Clerk.

[Endorsed]: E. 2252. 3/1. Circuit Court, First Circuit, Territory of Hawaii, at Chambers, in Equity. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al., Respondents, Decree. 35/161. Filed at 2:15 o'clock P. M. April 6, 1920. (Sgd.) B. N. Kahalepuna, Clerk. [36]

In the Supreme Court of the Territory of Hawaii.
October Term, 1920.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, LLEWELLYN NAPELA, GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor.

No. 1273.

Appeal from Circuit Judge First Circuit.
Hon J. J. BANKS, Judge.

Argued March 22, 23, 24, 1921.

Decided April 5, 1921.

COKE, C. J., KEMP and EDINGS, JJ.

Wills—Life Tenants and Remaindermen—Rule in Howe vs. Earl of Dartmouth.

Where personal estate is given in terms amounting to a general residuary bequest to be enjoyed by different persons in succession it is presumed to be the intention of the testator that such of his personalty as is of a wasting

or perishable nature is to be converted in such way as to produce capital of a permanent nature bearing interest unless upon the construction of the will it appears that the testator had a different intention. [37]

Same—Same—Provisions Which Negative the Presumption of Intention to Convert.

Directions by a testator to his trustees to carry on a ranching business, so long as it can be done so profitably, on a leasehold devised to them in trust to be enjoyed by different persons in succession, and investing them with a discretionary power to sell the leasehold when in their discretion they think that a sale would by reinvestment of the money realized from such sale be beneficial and inure to the benefit of or increase the trust estate, are inconsistent with an intention that the leasehold should be converted. [38]

Opinion of the Court by Kemp, J.

This proceeding was commenced in behalf of the complainants as trustees under the will and of the estate of James Gay, deceased, by a bill in equity praying for instructions as to their duties as trustees under said will. All parties now in being who are interested in the trust estate were made respondents. For convenience the minor respondents above named will be referred to as remaindermen and the other respondents as life tenants. The remaindermen are represented by a guardian *ad litem,* their interests being separate from and

opposed to the interests of the life tenants. The point at issue is whether certain wasting assets (leaseholds) should have been, or what remains of them should be, preserved by amortization or otherwise for the benefit of the remaindermen. The remaindermen contend that the value of the leaseholds and all additions and increase thereto constitute the *corpus* of the estate and should be preserved for their benefit, while the life tenants contend that it was the intention of the testator as shown by the terms of his will that his trustees should retain the *corpus* of the estate in the form in which he left it, paying to them all the income derived therefrom, including rents from subleases even though by so doing the estate may entirely waste away and leave nothing to the remaindermen at the termination of the trust. A decree was entered by the Circuit Judge adverse to the claims of the remaindermen and in accordance with the claims of the life tenants, from which decree the remaindermen have appealed to this court.

The testator made his will dated May 25, 1893, a copy of which is attached to the complaint. After providing for the appointment of his wife, Mary Ellen Gay, and his friend, Hermann Focke, to be executor and executrix of his will and also trustee of his estate under the will and directing them to pay all his just debts and [39] funeral expenses, the will provides:

> "I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my estate real personal or mixed and where-

soever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said trustee Hermann Focke and his successor in said trust to pay the rents, income, issues, and profits arising from and out of said trust estate as follows: one-half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike.

"And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said trustee or his successor to convey one-half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased child to take the parents share. And as to the remaining portion of said trust

and all additions or increase thereof, I direct my said trustee or his successor in said trust to convey the same unto the children of my said daughters, Alice Mary Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, share and share alike, and the child or children of any deceased child to take the parents share.

"And I direct my said trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen Gay to pay the share or portion of the income belonging to such child to the heirs that may survive such child dying."

Then follows a power of appointing new trustees and the will continues:

"It is my wish and I hereby direct that my said trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the trust estate created under this will, to sell and convey said property at Mokuleia free and barred of the trust created by this will."

The testator died three days after making his will leaving surviving him his wife and the three sons

and four daughters named in the will, the youngest of which was three or four years of age and [40] the eldest about sixteen years of age. His wife died in 1895 and his daughter Ethel died in 1902 unmarried. The will was duly admitted to probate soon after the death of the testator. The complainants are the present trustees of the estate devised by the will. At his death the testator's estate, as shown by the inventory filed in the probate proceeding, consisted of the following property: (1) a lease dated March 1, 1876, from the commissioner of crown lands of the government of Hawaii to the testator of the Ahupuaa of Humuula, Island of Hawaii, comprising an area of about 1200 acres for 25 years from date, expiring March 1, 1901, but prior to testator's death extended for a term of seven years, or until March 1, 1908, at a nominal rent or rent free (this lease was valued at the inception of the trust at $5000 and will be referred to herein as the Ookala lease), (2) a lease dated May 27, 1884, from J. P. Mendonca to testator of about 2500 acres of land at Mokuelia, Waialua, Oahu, for 50 years from May 1, 1884, expiring May 1, 1934, at an annual rent of $1250 and taxes (this lease was valued at the inception of the trust at $7500 and will be referred to herein as the Mokuleia lease); (3) cattle, horses, mules, chickens, farm implements, household furniture, etc. (The horses and mules were valued at the inception of the trust at $2310; the value of the cattle, chickens, implements and furniture does not so far as we are able to ascertain appear in evidence); (4) cash in

hand of agents $816.59. There was no real estate. The estate at the inception of the trust had a value, the complaint alleges, of $20,000 or thereabouts. The Ookala lease was cultivated to sugar cane by the Ookala Sugar Company under a sublease made by the testator in his lifetime and afterwards renewed by the trustees for the full term of the head lease. The sublease reserved a part of the sugar grown on the lands as rent in kind from which the trustees received for the years 1893–1908, both [41] inclusive, a total of $34,854.34. There was no rent paid by the trustees to the government, their lessor. The testator resided on the Mokuleia lease and there conducted a ranching business on the greater part of the land and subleased the remainder. At the time of his death he was receiving from subleases of portions of the Mokuleia lease a total annual rental of $2723.50. The trustees under the power contained in the will carried on the testator's ranching business from the date of his death until some time in the year 1906 when the livestock and movable assets used in connection with the ranching business were sold realizing $4065 net. This sum has been invested by the trustees and the investment held by them as *corpus* of the estate. On December 9, 1898, a portion of the Mokuleia lease containing an area of about 800 acres was leased by the trustees to B. F. Dillingham for the balance of the term of the head lease at a rental of five per cent of the sugar or the proceeds thereof grown thereon. The sublease to B. F. Dillingham was assigned to the Waiaula Agricultural Company,

and on July 2, 1902, the trustees subleased to the ~~Waialua Agricultural Company~~ for the remainder of the term of the head lease 65 acres more of the Mokuleia lease at a like rental as in the lease to B. F. Dillingham. On or about April 28, 1906, when the ranch stock was sold the rest of the Mokuleia lease was subleased by the trustees to others for fixed annual rentals and for the remainder of the term of the head lease. All of the Mokuleia lease is now sublet. The approximate total gross rent from the subleases of the Mokuleia lease beginning with the year 1894 and including the year 1919 is shown to have been $281,033.76. From this total the trustees have paid to Mr. Mendonca, their lessor, $1250 annually for 26 years, or $32,400, leaving $248,-533.76, from which of course such expenses as court costs, trustees' commissions, etc., the amount of which is not shown, should be deducted in order to ascertain the total net proceeds of said subleases. The trustees paid out yearly all cash received by them from every source except the sale of livestock and ranch movable assets, which netted $4065 as heretofore stated, first, to Mrs. Gay during her lifetime and after her decease to testator's children. The Ookala [42] lease, as already stated, has expired. There is nothing left of this part of the estate to represent it, all of the net proceeds received from the sale of sugar, the rent in kind, having been paid by the trustees to the tenants for life. If the trustees' method of administering the trusts is continued the same fate awaits the Mokuleia leasehold in 1934 unless all of testator's six children

now living, the youngest of whom will be about 45 and the eldest 57, die before that date. Evidence adduced at the hearing establishes a present sale value of the Mokuleia lease of $87,000 to $90,000, a value which is decreasing about $5000 annually. No evidence, other than the appraisement filed in the probate proceeding, of the value of either of said leaseholds at the date of the testator's death is shown.

The trustees allege in their complaint that they have "been advised by counsel that it is uncertain and doubtful from the language used in the will of the testator what the testator's intentions were as to the respective rights in the estate of the life tenants and remaindermen and that it is a matter of uncertainty and doubt whether under the provisions of said will and in view of the fact that the principal assets of the trust estate, namely, the said Mokuleia and Ookala leaseholds, were of a wasting and diminishing nature the trustees of the said estate were authorized in the past or will be authorized in the future to pay out all the net rents, income, issues and profits of the said estate to the life tenants without making provision out of said rents, income, issues and profits for the preservation of the *corpus* of the said estate for the benefit of the remaindermen, or whether there should not have been retained in the past and should not in the future be retained out of the said rents, income, issues and profits such sums as may be necessary for the purpose of restoring for the benefit of the remaindermen the capital or *corpus* of said estate

to the value thereof at the death of the testator," and it is to procure the advice of the Court on the question thus raised that this proceeding was instituted.

As will appear from a consideration of the question presented [43] our decision must turn principally upon the question of whether or not the rule laid down in Howe vs. Earl of Dartmouth, 7 Ves. 137 (1802), and ever since known by the name of that case, is applicable to this case. There the testator gave all his personal and landed estate to one for life and to others afterwards. The will contained no language which the Court could say amounted to a specific bequest of such personal estate as was the testator's at the time of his death. Some of the estate at the time of the testator's death was invested in wasting assets (long and short annuities) and some in unauthorized securities (bank stock). Held, that these wasting assets are to be converted in such way as to produce capital, bearing interest.

The rule as understood and applied by the English courts has been more clearly stated in later cases, a few of which we will now notice.

In McDonald vs. Irvine, 8 L. R. (Ch. Div.) 101, at p. 121, Lord Justice Thesiger made a short and very lucid statement of the rule as follows: "The rule itself is a simple one, founded upon the presumption, that where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, and ef-

fectuating the presumed intention of the testator by the conversion into investments approved by the court of so much of the personalty as is at the death of the testator of a wasting, or perishable, or insecure nature, and also of reversionary interests." In Lichfield vs. Baker, 2 Beav. 481, 483 (48 Eng. Rep. (Repr.) 1267), is to be found another very clear statement and application of the rule in the following language: "The only point on which I need call on the plaintiffs' counsel to reply, is on the extent of relief now to be granted. As to the other question, I take this [44] to be the rule of the Court, that when a testator has given an estate, or the residue of an estate, to persons in succession, as to one for life, with remainder to another person, the Court presuming that the testator intended that the remainderman should have something, will so deal with the property, if it be a property that is wearing out and may terminate during the life estate, as to secure the accomplishment of that intention, and give the remainderman something; for that purpose it will convert the perishable into a permanent property, and give the income which arises from it to the persons entitled for life in succession, and preserve the capital for the person entitled in remainder. That is the rule; and the court only acts upon the general intention of the testator, that something should be given to the person who is the donee in remainder; but if, upon the construction of the will, it appears the testator had another intention, that is to say, an intention to give to one or more persons who are

to take for lives or during a succession of lives, the enjoyment of the property in the state he left it at the time of his death, then the court will carry that intention into effect; and every one of the cases which have been cited, and every case which can arise, will turn upon this question of construction, whether you can find upon the face of the will an intention that the legatee for life shall enjoy the property in the way in which it stood at the testator's death, even to the extent of defeating the testator's intention to bequeath something to the remainderman. I believe that in all the cases which have been cited in opposition to the conversion, there have been words clearly indicating, from the testator's description of the property or some other circumstance, that the testator intended the donee to enjoy it for life, in the same way as it stood at his death." In Pickering vs. Pickering, 4 My. & Cr. 289, 41 Eng. Rep. (Repr.) 113, at 116 it is said: "All that Howe vs. Lord of Dartmouth (7 Ves. 137) decided—and [45] that was not the first decision to the same effect—is that, where the residue or bulk of the property is left *en masse,* and it is given to several persons in succession as tenants for life and remaindermen, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in

such a state as will allow of its being so enjoyed. This cannot be, unless it is taken out of a temporary fund and put into a permanent fund. But that is merely an inference from the mode in which the property is to be enjoyed if no direction is given as to how the property is to be managed. It is equally clear that, if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the court cannot overlook."

It is with the principle announced in the above cases in mind that the will is to be examined, from which we gather that it is after all a question of intention and the rule in Howe vs. Earl of Dartmouth is founded on what is presumed to be the intention of the testator where an estate is given to one for life and afterwards to others. The testator's presumable intention is that there shall be equality of enjoyment where there are no directions as to how the estate shall be enjoyed. It is the intention presumed by law in the absence of any contrary intention expressed by the testator, and being only a presumption of intention, it must give way to any intention expressed by the testator. When once you have arrived at the intention of the testator you must give effect to it notwithstanding [46] the rule in Howe vs. Earl of Dartmouth. Any other conclusion would be in conflict with our own decisions. Mercer vs. Kirtpatrick, 22 Haw. 644;

Fitchie vs. Brown, 18 Haw. 52; Rooke vs. Queen's Hospital, 12 Haw. 375.

Counsel for the life tenants argue that this will is taken out of the rule in Howe vs. Earl of Dartmouth by provisions in it which they say clearly show that it was testator's intention that his estate should be held by the trustees in the state in which he left it, paying the rents, income, issues and profits arising from and out of it to them, while the guardian *ad litem* for the remaindermen argues that there is nothing in the will which distinguishes it from the will in that case. From the fact that the will provides for *rents* to be paid to the life tenants and the further fact that the testator had no real estate the life tenants argued that the word "rents" could apply only to leaseholds and that the obligation to convert is thereby negatived. They cite Goodenough vs. Tremamondo, 2 Beav. 512 (48 Eng. Rep. (Repr.) 1280). There the will, which was not executed so as to pass real estate, after bequeathing specific legacies, provides: "And as to all the rest, residue and remainder of my estate and effects whatsoever and wheresoever, I give, devise and bequeath the same unto Anthony Angelo and Charles John Lawson, their executors, administrators, and assigns, in trust to permit the rents, issues, profits, interest, and annual proceeds thereof to be received and taken by my said son Richard Collier Andree, for and during the term of his natural life, for his own use and benefit; and from and after his decease, upon trust for Ann and Sophia, the two daughters of my said son Richard

Collier Andree, when they shall attain the age of twenty-one years, equally to be divided between them, share and share like. And I empower my said trustees and executors, after the death of my said son Richard Collier Andree, to apply the *rents,* interest, profits, and annual proceeds of my said [47] residuary estate and effects, for and towards the maintenance and education of the said Ann and Sophia Andree, until their respective shares shall become vested." Part of the estate consisted of a leasehold. The master of the rolls said that he could not declare this to be a case of conversion without striking out altogether the word "rents" which was twice repeated in the will and it appeared that there was no other property belonging to the testator except the leaseholds to which the term "rents" was applicable. Other cases are cited in support of this contention but this one seems to be the most nearly in point of any.

The case at bar is distinguished from Goodenough vs. Tremamondo primarily by the fact that the will in that case was not executed so as to pass real estate, while the will in the case at bar was not so restricted although the testator owned no real estate at the time of his death. Under these circumstances we cannot say that the word "rents" refers to anything more than the real estate which the testator might have acquired between the making of his will and his death and which would have passed by his will in the form he made it had he acquired any.

Our conclusion as to the effect of the use of the word "rents" is supported by the decision in Pickup vs. Atkinson, 4 Hare, 624 (67 Eng. Rep. (Repr.) 797), where, after a specific gift of certain leasehold houses to the testator's wife for life with remainder over to his nephew, the testator bequeathed the "rents and profits, dividends and interest" of all the residue of his property to his wife for her life with gift over of the whole of the residue after her decease to other persons, and there was no freehold. The vice-chancellor, in discussing the question, said: "If the use of the word 'rents' in one case, with reference to leaseholds not specifically bequeathed, is to be taken as sufficient evidence that the tenant for life of the residue was intended to enjoy the leaseholds [48] in specie, I do not know how to stop short of the conclusion that any other word by which income may be described is to have the same effect with reference to the property in respect to which it is paid. The use of the word 'dividends,' for example, in another case, ought to be admitted as sufficient evidence that every portion of the residue, though not specifically bequeathed, the annual profits of which are returned under the name of dividends, was also intended to be enjoyed in its existing state, which would include every species of property yielding dividends from consols, which the Court considers a permanent fund, down to the lowest mercantile security; and the same argument in strictness would apply to the word 'interest' where the property yielded income in the form of interest. It appears to me

impossible to admit that conclusion. I think the correct reasoning upon the words 'rents and profits, dividends and interest' of a general residue, considered alone, must be analogous to that which is applied to the residue itself. The mere enumeration of particulars in the latter case does not give a specific character to the bequest, because the whole clause is in effect a mere residuary bequest. I think the same observation applies to a case like this; the enumeration of particulars of income being nothing more than a gift of the income of the residue, which means income only. This conclusion appears to me to be put beyond dispute when it is considered that the words 'rents, profits, dividends and interest' in this case means rents, profits, dividends and interest, not of the property the testator then had, but of such property, real, personal or mixed, as he might happen to have at the time of his death. * * * The only two cases which bear any analogy to the present are Pickering vs. Pickering and Goodenough vs. Tremamondo (2 Beav. 512). In Pickering vs. Pickering the word 'rents' occurred; but it does not appear to me that the word was relied upon as alone constituting [49] a ground for preserving the property in specie. There are other and very elaborate reasons given for that conclusion. In Goodenough vs. Tremamondo the word 'rents' occurred twice; and Lord Langdale appears to have thought that the use of it the second time was conclusive evidence that the testator treated his property as unconverted when the estate in remainder fell into pos-

session, and therefore that the legacy was specific in the direct sense of that term. And he says, further, there was no other property belonging to the testator, except the leaseholds, to which the term 'rents' was applicable, which shows that he considered the bequest as specific in the strict sense of that term. In this case any property, freehold or leasehold, to which the testator might have been entitled at his death would satisfy the gift; and that, in my opinion, shows that the testator could not have had any particular object in his mind to which the direction was applicable but that he referred to the income of his property generally." See also Chambers vs. Chambers, 15 Sim. 183 (60 Eng. Rep. (Repr.) 587); Morgan vs. Morgan, 14 Beav., 72 (51 Eng. Rep. (Repr.) 214); Mills vs. Mills, 7 Sim. 501 (58 Eng. Rep. (Repr.) 929); Boardman vs. Mansfield, 79 Conn. 634 (66 Atl. 169, 12 L. R. A. (N. S.) 793–6).

But the life tenants do not rely alone or principally upon the use of the word "rents" to support their contention. Their main argument is based upon that portion of the will which directs the trustee to carry on the business of ranching at Mokuleia so long as it can be done profitably and without loss and invests them with a discretionary power to sell their property at Mokuleia. As applied to the Mokuleia lease we think their reasoning is sound. If the conversion was required at all it must take place as soon after testator's death as may be. The direction to the trustees to "manage, conduct and carry on the business of ranching and

stock raising at [50] Mokuleia" and the discretion with which the testator invested the trustees in the matter of selling "the property at said Mokuleia" are both inconsistent with an intention that the property was to be converted, for if they had a right to retain the property until "in their discretion they think that a sale of all the property at Mokuleia would by reinvestment of the money realized from such sale of such property be benefited and inure to the benefit of or increase the trust estate created under the will" they may retain it for years, or, indeed, may never convert it at all, and if so they are only exercising the discretion given to them by the will. In re Bates, L. R. 1907 (1 Ch.) 22; Alcock vs. Sloper, 2 Myl. & K. 699 (39 Eng. Rep. (Repr.) 1111).

Neither do we see any merit in the contention of the remaindermen that since the trustees ceased to carry on the ranching business at Mokuleia and subleased the lands they in effect sold the head lease to be paid for in instalments and that the amounts received for the sublease are *corpus* instead of income. If, as we have concluded, the trustees were authorized under the terms of the will to retain the head lease whatever sums they received for its use were income and the life tenants entitled to receive it.

But what we have said as to the effect of the above provisions upon the right of the trustees to retain the Mokuleia lease has no application to the Ookala lease and there is no other language in the will which in our opinion has any reference to the

manner in which the Ookala lease was to be enjoyed. The Circuit Judge apparently considered that the question presented related entirely to the management of the estate in the future and dismissed the Ookala lease with the statement that it had already expired. Since the trustees ask for instructions as to their duties in the execution of the trust and that all proper accounts may be taken and all necessary directions given for carrying the testator's intention into [51] execution we think the whole matter should be settled in this proceeding. The restoration of the *corpus* of the estate represented by the Ookala lease is we think as much involved as if the case had been commenced by the remaindermen on a bill for an accounting. There are not, however, before us sufficient facts to enable us to enter a decree.

We think, therefore, that the cause should be remanded with instructions to the Circuit Judge to modify the decree appealed from so as to require of the trustees an accounting in accordance with the views herein expressed unless within five days from the filing of this opinion the parties can and do agree upon sufficient facts to enable us to enter a proper decree. Unless such an agreement is filed within the time above stated an order will be entered remanding the cause as above stated.

W. L. STANLEY filed a brief for the trustees but did not argue.

H. EDMONDSON (HENRY HOLMES with him on the brief), for the minor respondents.

L. J. WARREN (W. O. SMITH and MOTT-SMITH & LINDSAY with him on the brief), for the life tenants.

JAMES L. COKE.
S. B. KEMP.
W. S. EDINGS.

[Endorsed]: No. 1273. Supreme Court, Territory of Hawaii. October Term, 1920. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, vs. Llewellyn Napela Gay, et al. Opinion. Filed April 5, 1921, at 3:50 P. M. J. A. Thompson, Clerk. [52]

In the Supreme Court of the Territory of Hawaii.
October Term, 1920.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANNATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, AL-

BERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, Alice K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor.

No. 1273.

PETITION FOR REHEARING.

Filed April 16, 1921. Decided May 7, 1921.

COKE, C. J., KEMP, J., and Circuit Judge FRANKLIN in Place of EDINGS, J., Absent.

Opinion of Court on Petition for Rehearing.

PER CURIAM: The minor respondents in the above-entitled cause, referred to in our opinion filed April 5, 1921, as remaindermen, have filed a petition for a rehearing asking that we instruct the trustees as to the method that should be followed in arriving at the *corpus* or capital value of the Ookala leasehold and (or) that we enter a decree that the *corpus* or capital value thereof was $34,-854.34. They assert that the record contains sufficient facts to enable us to enter a decree. With this contention we do not agree. But even if the facts were all before us it would be discretionary with us as to whether we would enter a decree [53] or remand the cause to the circuit judge. (Hind vs. Wilder's S. S. Co., 13 Haw. 174, 176.) We think it only fair to all parties that the cause be remanded to the Circuit Judge where a full hearing can be had and the amount for which the trustees must account be properly ascertained. Neither do we think that it would be proper for us at this time to undertake to issue instructions as to the

method to be followed in arriving at the value of the Ookala leasehold there being nothing in the record to indicate that the Circuit Judge is in need of such instructions.

For the reasons set forth the petition for rehearing is denied and in compliance with the statement in our opinion of April 5 "unless within five days from the filing of this opinion the parties can and do agree upon sufficient facts to enable us to enter a proper decree * * * an order will be entered remanding the cause" the cause is remanded to the Circuit Judge for further proceedings not inconsistent with that opinion.

H. HOLMES and H. EDMONDSON, for the petition.

By the Court,
J. A. THOMPSON,
Clerk.

[Endorsed]: No. 1273. Supreme Court, Territory of Hawaii. October Term, 1920. H. Focke et al., Trustees Under the Will and of the Estate of James Gay, Deceased, vs. Llewellyn Napela Gay, et al. Decision on Petition for Rehearing. Filed May 7, 1921, at 9:35 A. M. J. A. Thompson, Clerk, [54]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

No. 1273.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY et al.,

Respondents.

Notice of Decision on Appeal.

To the Honorable JAS. J. BANKS, Third Judge of the Circuit Court of the First Circuit, Territory of Hawaii:

Please take notice that in the above-entitled cause the Supreme Court has filed the following decision on appeal:

"DECISION ON APPEAL.

"In the above-entitled cause, pursuant to the opinion of the above-entitled court filed herein on the 5th day of April, 1921, and no agreement having been filed by the parties upon which a proper decree may be entered in this Court, the said cause is hereby remanded to the Circuit Judge of the court below with instructions to modify the decree appealed from so as to require of the trustees an accounting in accordance with the views expressed in said opinion.

"Dated, Honolulu, T. H., May 27, 1921.

"By the Court:

[Seal] "J. A. THOMPSON,

"Clerk, Supreme Court."

Dated, Honolulu, T. H., May 27, 1921.

J. A. THOMPSON,
Clerk, Supreme Court.

SMITH, WARREN & STANLEY,
Attorneys at Law,
Honolulu, Hawaii.

[Endorsed]: No. 1273. Supreme Court, Territory of Hawaii. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay, et al. Notice of Decision on Appeal. Filed May 27, 1921, at 4:00 P. M. J. A. Thompson, Clerk. Smith, Warren & Stanley, Attorneys, Honolulu, T. H. [55]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

AT CHAMBERS—IN PROBATE.

BILL FOR INSTRUCTIONS.

H. FOCKE, et al., Trustees Under the Will and of the Estate of JAMES GAY, Deceased,
Complainants,

vs.

LLEWELLYN NAPELA GAY, et al.,
Respondents.

Decision.

On the appeal heretofore taken in this case it has been determined by the Supreme Court that the "Ookala lease" which belonged to the testator's estate should upon the testator's death have been converted by the trustees into cash and the proceeds held as part of the *corpus* of the estate, instead of having been held, as was the Mokuleia lease, and all of the rents therefrom paid as income to the life tenants; and that an accounting should now be taken to determine what amount should be restored as the *corpus* represented by the Ookala lease in order that as between the life tenants and the remaindermen the latter shall have that amount restored and held for them as capital.

The parties having now presented evidence and argument upon the issues involved, I am of the opinion that the figure of $5,000, which was placed in the inventory of the estate shortly after the testator's death, as the "value" of the Ookala lease, cannot equitably be taken as a proper basis for any decision in this case. That this lease might not have brought much more than that sum had it then been sold may be [56] conceded, but the fact is that it was not sold, and that a total net sum of $34,-329.24 was actually realized by the trustees out of this property. It is the sum of $34,329.24 which was actually so received by the trustees from this lease which must now be apportioned into sums representing income for the life tenants and capital for the remaindermen.

I am of the opinion that the proper method of determining what part of this sum of $34,329.24 is income and what part is capital would be to assume that each sum, as received by the trustees, should have been considered as property belonging to the estate of which part should have been invested as capital and part distributed as income; and that the portion constituting capital should be ascertained by finding what sum if received at the death of the testator, would amount with interest at six per cent, and making annual rests, to the whole sum actually received. Adopting this method I find that $20,668.35 would be that sum, and was the true actuarial value of the Ookala lease in 1893.

The life tenants offered evidence showing that when Mr. Gay made his will on May 25, 1893, he was in a very low and dying condition and therefore sent his physician for his lawyer to come and prepare this will in place of one already existing; the purpose being to show that the will here in question was made by him with reference only to the estate which he then already had and was disposing of, and, therefore, that in using the word "rents" in the clause "rents, income, issues and profits arising from and out of said trust estate," when he did not then own any real estate, he meant "rents" from both Ookala and Mokuleia leases rather than to rents from any real estate he might possibly yet acquire before his death. This [57] was objected to by the guardian *ad litem* for the re-

maindermen upon the ground that it was outside the scope of the issues left to be determined by this Court under the decision of the Supreme Court, and that it was incompetent, irrelevant and immaterial, and that it would tend to change the terms of the will by oral evidence. But as this Court did not on the previous hearing either consider or make any finding as to the effect of the word "rents" as used in the will, and the decision of the Supreme Court on this point rested upon a record in which that issue was not fully gone into, I think the life tenants are entitled to have the fact of the testator's dying condition shown by the record as being one of the facts and circumstances surrounding the execution of the will. I hold, however, that it would not affect the question of the duty of the trustees to have converted the Ookala lease as has now been directed by the Supreme Court.

A decree will therefore be entered requiring the trustees to set apart out of the accumulated income now in their hands the sum of twenty thousand six hundred sixty-eight and 35/100 Dollars ($20,668.35) as capital to which the remaindermen will be entitled on the termination of the trust, and which sum will in the meantime be invested to pay the income of the life tenants.

Dated, Honolulu, T. H., August 1, 1921.

[Seal] JAS. J. BANKS,
Third Judge First Circuit Court.

[Endorsed]: Filed at 2:10 o'clock P. M. August 1, 1921. B. N. Kahalepuna, Clerk. [58]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR INSTRUCTIONS.

H. FOCKE et al., Trustees Under the Will and of the Estate of JAMES GAY, Deceased,
Complainants,

vs.

LLEWELLYN NAPELA GAY, et al.,
Respondents.

Decree.

Pursuant to the decision filed herein on this first day of August, 1921, and the separate order made and filed this day respecting the allowance and payment of counsel fees and disbursements in the above-entitled cause,—

IT IS ORDERED, ADJUDGED AND DECREED that H. Focke and H. M. von Holt, as trustees under the will and of the estate of James Gay, deceased, be and they are hereby instructed and directed to set apart out of the income of the trust estate the sum of Twenty Thousand and Six Hundred Sixty-eight and 35/100 Dollars ($20,668.35) as capital to which the remaindermen will be entitled on the termination of the trust, less the amounts which the trustees are required to pay therefrom on account of counsel fees and disbursements under the separate order in that behalf this day filed.

Dated, Honolulu, T. H., August 1, 1921.

[Seal] JAS. J. BANKS,
Third Judge, First Circuit Court.

[Endorsed]: Filed at 2:10 o'clock P. M. August 1, 1921. B. N. Kahalepuna, Clerk. [59]

In the Supreme Court of the Territory of Hawaii.

October Term, 1921.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, et al.

No. 1348.

Appeals From Circuit Judge First Circuit.

Hon J. J. BANKS, Judge.

Argued January 6, 1922.

Decided February 28, 1922.

COKE, C. J., KEMP and EDINGS, J. J.

Trusts—Wasting Asset—Value Ascertained.

Whenever a leasehold which should have been converted into a permanent investment at the inception of the trust is held by the trustees until the expiration of the lease and it afterwards becomes necessary to ascertain its value it is proper to consider what it produced in order to ascertain its value at the time it should have been converted.

Appeal and Error—Final Decree—Effect of Appeal from.

A general appeal from a final decree in equity brings up for review all interlocutory orders, not appealable as of right, which deal with the issues in the case.

Same—Same—Same.

An appealable order made in a proceeding growing out of the suit but foreiin to the subject matter of it is not brought up for review by a general appeal from the main decree. [60]

Opinion of the Court by Kemp, J.

The complainants as trustees under the will and of the estate of James Gay, deceased, filed a bill in equity for instructions as to their duties under the will. From the decree entered by the Circuit Judge the minor respondents, remaindermen, through their guardian *ad litem* prosecuted an appeal to this court. Our opinion on that appeal (26 Haw. 1) is referred to for the history of the case. It is sufficient to say here that the cause was remanded with instructions to the Circuit Judge to modify the decree appealed from so as to require the trustees to set aside as capital the value of the Ookala leasehold. When the matter again came before the Circuit Judge on the remand he heard evidence as to the rentals produced by the Ookala leasehold from the death of the testator to the expiration of the lease and from the evidence and calculations which he had an actuary make found its value to be $20,668.35. A decree was accord-

ingly entered requiring the trustees to set aside that amount as capital or *corpus* of the estate. In order to arrive at that value each installment of rent received by the trustees from said leasehold was considered to be part income and part capital. To determine what portion of each installment of rent constituted capital calculations were made by the actuary to ascertain what sum put out at six per cent interest with annual rests on the date of testator's death would amount to each installment actually received at the time it was received. Each installment was figured separately and the sum of the amounts thus ascertained equals the value found by the Circuit Judge. The remaindermen being dissatisfied with the decree in this respect have again appealed to this court.

Appellants complain because the Circuit Judge entered a new decree instead of modifying the former decree. This constitutes at most an immaterial departure from the instructions contained [61] in the order remanding the cause and is not prejudical to the rights of the appellants. The Circuit Judge was compelled to hear evidence in order to comply with the order of this Court and having done so it was not improper for him to enter such decree as the evidence warranted.

On the question of the correctness of the decree it is argued that the following four courses were open to the trustees at the inception of the trust: (1) They could have valued the Ookala leasehold at the inception of the trust and paid to the tenants for life six per cent interest on such value;

(2) they could have sold the leasehold, invested the proceeds and given the income to the life tenants; (3) they could have invested the rents as received and paid the income to the life tenants, and (4) they might (by analogy to a direct gift of money for life) have paid the rents as received to the tenants for life upon receiving reasonable security to preserve the fund for the remaindermen. It is further argued that what the trustees did was to adopt the fourth course except that they did not exact security of the life tenants for the preservation of the fund.

We are not able to concede either that the trustees had the four courses open to them or that they have adopted the fourth course. The only course which the trustees had an absolute right to pursue was to promptly convert the wasting assets into an authorized permanent investment and pay the income derived therefrom, whatever it might be, to the life tenants and preserve the capital amount for the remaindermen. Not having pursued this course their error must now be corrected by requiring them to set aside as capital or *corpus* of the estate a sum equal to the one which they should have had for that purpose at the time. At the time of the testator's death the value of the Ookala leasehold was uncertain because the amount it would produce was uncertain, but the information now [62] makes its true value as of that date at least theoretically ascertainable, and the calculations which the Circuit Judge had the

actuary make based on the receipts from the leasehold showed that value.

In Kinmouth vs. Brigham, 5 Allen 270, 279, where a portion af the trust estate consisted of an investment by a special partner in a trading partnership, the Court after stating that such investment was one which the Court could not sanction said: "It is obviously difficult in this case to determine what was the value of the investment at the testator's decease by any other mode than a computation based upon the whole product ultimately realized from it. * * * We think, therefore, that upon a just construction of the will equity will require that the profits received by the executors from the special partnership should not be regarded or treated exclusively as income but that they be treated when received from time to time as property belonging to the estate, a part of which is to be invested as capital and a part distributed as income; which parts are to be ascertained by finding what sum if received at the death of the testator would amount, with interest at six per cent and making annual rests, to the sum actually received, at the time it was received; and that the sum so found should be invested as principal and the remainder distributed as income." The Circuit Judge evidently had this case before him and was largely influenced by it in adopting the method used to ascertain the capital value of the Ookala leasehold.

In this case, as in the Kinmouth case, it is obviously difficult to determine what was the value of

the investment at the testator's death by any other mode than a computation based upon the whole product ultimately realized from it. We therefore hold that the Circuit Judge committed no error in thus determining the value of said leasehold. But we are not to be understood as holding that in every such case six per cent should be taken as the correct [63] rate of interest. Whenever interest is to be allowed for the failure to pay money when it is due the law knows no other rate than the one established by law, but here we are to ascertain between the tenants for life and the remaindermen what part of the gross sum now in hand shall be treated as capital and what part as income, and when we are called upon to find out what sum at a particular date if invested by the trustees would have been sufficient to produce with its income the gross sum now on hand we must look to the actual income that can be obtained from authorized investments and not to the rate of interest established by law. (Edwards vs. Edwards, 183 Mass. 581, 67 N. E. 658; Lawrence vs. Littlefield, 215 N. Y. 561, 109 N. E. 611; Furniss vs. Cruickshank, 130 N. E. (N. Y.) 625.) No point is made of the rate of interest used in the computations in this case, the objection being to the method used rather than to the details of applying the method.

Shortly after the case was remanded to the Circuit Court Mr. Edmondson, guardian *ad litem* for the minor respondents, filed a motion for the allowance to him of $2000 for his services in the

Supreme Court on the former appeal and for the further sum of $1000 for the services of counsel employed by him to assist him on that appeal. At the conclusion of the hearing as to the value of the leasehold in question evidence was heard as to the nature, extent and value of the services of the guardian *ad litem* after which the Circuit Judge simultaneously with the entry of the decree entered a separate order allowing him a fee of $1000 "for his services rendered in this case in the Supreme Court to date, and a further sum of $1000 for services of counsel employed by the said" guardian *ad litem*" * * * which total sum was directed to be apportioned between and paid forthwith out of the capital and income respectively in the proportions that $20,668.35 and $13,-060.89, respectively, bear to the sum of $34,329.34." Also upon the oral [64] application of counsel for the trustees made at the time of the entry of the order it was further ordered that the sum of $750 be paid to him for his services as counsel for the trustees on the appeal and to date, which sum was similarly apportioned between and to be paid out of the capital and income. From this order Mr. Edmondson has appealed and urges that the $1000 fee allowed him is inadequate.

The evidence as to the value of the services of the guardian *ad litem* is conflicting. The Circuit Judge in order to determine what was a reasonable fee for the guardian *ad litem* necessarily acquainted himself with the nature and extent of the services rendered. If he desired more definite information

than was acquired during the progress of the trial he was then at liberty to hear evidence as to the nature and extent of the services rendered for which the fee was sought. He was also at liberty to take the judgment of professional men as to the value of such services but such evidence is not necessarily controlling even when it is not conflicting. When the Circuit Judge had familiarized himself by either method with the nature and extent of the services and the other circumstances generally it became his duty in the exercise of a sound discretion to fix the amount of the fee to be allowed (Guardianship of Humeku, 15 Haw. 394; Magoon vs. Fitch, 16 Haw. 13), and unless it appears that he has abused that discretion his action in fixing the amount of the fee will not be disturbed on appeal. In this case the guardian *ad litem* had already been allowed a fee of $1000 for his services in the first trial in the Circuit Court. For prosecuting the appeal from the decision of the Circuit Judge in that trial he has now been allowed $1000 for counsel which he employed to assist him and $1000 for his own services on appeal and the second hearing in the Circuit Court. Considering the benefits resulting from the guardian *ad litem's* services and all the surrounding [65] circumstances we regard the amount allowed by the Circuit Judge as very liberal. It cannot be said therefore that the Circuit Judge abused the discretion reposed in him.

It is also argued that that portion of the order apportioning these counsel fees between capital

and income is erroneous. The first question which presents itself is one which we have raised and called upon counsel to discuss, viz., whether or not the issue is raised by either of the appeals. The appeal of Mr. Edmondson, although a general appeal from the order in question, does not raise the issue for he has not such an interest in the subject matter as entitles him to raise it. In fact it is not contended that the issue is raised by his appeal. It is contended, however, in behalf of the remaindermen that their appeal from the decree does raise the issue of the correctness of the apportionment although contained in an order entirely separate from the decree from which they have appealed. It is well settled that an appeal from a final decree in equity brings up for review all interlocutory orders, not appealable directly as of right, which deal with issues in the case. (Lee Chu vs. Noar, 14 Haw. 648; Scott vs. Stuart, 22 Haw. 641.) Whether such an appeal would bring up for review an intermediate order directly appealable, because final in its nature, which settles some issue in the case was not decided by either of the cases cited, nor is it necessary for us to decide it here. But the case of Scott vs. Stuart does decide that an appealable order made in a proceeding growing out of the suit but foreign to the subject matter of the suit would not be up for review upon an appeal from the decree and that an order or decree directing the payment of money other than the payment into court for further disposition is final in its nature and appealable. There the Court

was discussing an order entered in a partition proceeding but made in response to a motion of an attorney, who had [66] theretofore been appointed master in chancery in said partition proceeding, for the allowance to him of a fee for services which he had rendered in obedience to an order of the Circuit Judge in resisting an application of one of the parties to said partition proceeding for a writ of prohibition against himself and the Circuit Judge by which said party sought to prevent further action under said order appointing him master. In response to said motion the Circuit Judge fixed his fee and ordered it paid by the clerk out of funds on deposit in court in said partition proceeding. In discussing that order this Court said: "It should be pointed out, however, that that order was an appealable one, and as it was made in a proceeding independent of the suit for partition and foreign to the subject matter of that suit, though growing out of it, the order would not, upon final decree, be up for reconsideration or review." Here the order in question was made in the case on trial but in response to the motions of counsel for the trustees and the remaindermen to have their fees for services in a former appeal allowed and would seem to be ruled by the holding in Scott vs. Stuart, unless there are other facts which distinguish it. The only fact which has a tendency to distinguish this order from that is a recital in the decree following the portion ordering the trustees to set aside as capital the value of the Ookala leasehold

to the effect that the remaindermen will be entitled to this sum on the termination of the trust "less the amount which the trustees are required to pay therefrom on account of counsel fees and disbursements under the separate order in that behalf this day filed."

After careful consideration of this phase of the matter we are of the opinion that the recital in the decree could have no bearing on the question unless it had the effect of making the order allowing counsel fees a part of the decree. That it does not have this effect seems clear. The decree orders the full value of the Ookala leasehold as found by the Circuit Judge set aside by the [67] trustees as capital and the further recital that the remaindermen will be entitled to that sum on the termination of the trust less the amount of fees ordered paid out of it is of no effect for the reason that such recital could not have the effect of irrevocably fixing the amount to which the remaindermen will be entitled at the termination of the trust. It is not impossible that further sums may be ordered paid out of capital before the termination of the trust, in which event the remaindermen would not be entitled to that amount. It seems clear to us that the most that can be said of the order in question is that it was made in a proceeding which was collateral to the case on trial. It did not settle any issue in that case and is foreign to the subject matter thereof although growing out of it. It necessarily follows that the general appeal of the remaindermen from the decree does not bring up for review

the order allowing and apportioning the payment of counsel fees.

Both the decree and the order should be affirmed and it is so ordered.

W. L. STANLEY, for the trustees.

H. EDMONDSON, in proper person and for the minor respondents.

L. J. WARREN (W. O. SMITH with him on the brief), for the life tenants.

JAMES L. COKE.
S. B. KEMP.
W. S. EDINGS.

[Endorsed]: No. 1348. Supreme Court Territory of Hawaii. October Term, 1921. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, vs. Llewellyn Napela Gay, et al. Opinion. Filed February 28, 1922, at 11:20 A. M. J. A. Thompson, Clerk. [68]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY,

ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Decree.

In the above-entitled cause, pursuant to the opinion of the above-entitled court rendered and filed on the 28th day of February, 1922, the decree and order, both dated the 1st day of August, 1921, of the Court below are affirmed.

Dated, Honolulu, T. H., March 8, 1922.

By the Court.

[Seal] ROBERT PARKER, Jr.,
Assistant Clerk, Supreme Court.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Decree. Rec'd and filed in the Supreme Court, Mar. 8, 1922, at 2:55 o'clock P. M. Robert Parker, Jr., Assistant Clerk. H. Edmondson, Honolulu, T. H., Attorney for Minor Respondents. [69]

In the Supreme Court of the Territory of Hawaii.
No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Petition for Appeal.

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii.

Now come Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Llewellyn Napela Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, by Harry

Edmondson, their Guardian *ad Litem,* and feeling themselves aggrieved by the final decree of this Court entered herein on the eighth day of March, A. D. 1922, hereby pray that an appeal may be allowed from the said decree to the [70] United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that a transcript of record, proceedings and documentary exhibits upon which said decree was made duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition, petitioners herewith present their assignment of errors.

Your petitioners further show that said decree was rendered in an action in equity and that the amount involved, exclusive of costs, exceeds $5000.00.

H. EDMONDSON,

Guardian *ad Litem* for the Minor Respondents-Appellants.

Territory of Hawaii,
City and County of Honolulu,—ss.

H. Edmondson, being duly sworn, states that he is guardian *ad litem* for the petitioners named in the foregoing petition.

That he has read the foregoing petition and knows its contents and that the matters and things therein set forth are true of his own knowledge.

And further, that the amount involved in the cause aforesaid, exclusive of costs as shown by

the record in said cause, exceeds the value of $5000.00.

H. EDMONDSON.

Subscribed and sworn to before me this 28th day of June, 1922.

[Seal] ALEXANDER A. HOBSON,
Notary Public, First Judicial Circuit, Territory of Hawaii. [71]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, LLEWELLYN NAPELA GAY, a Minor,

Respondents.

Assignment of Errors on Appeal.

Now come the appellants, Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Llewellyn Napela Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, by Harry Edmondson, their guardian *ad litem,* and in connection with their petition for appeal say that in the record, proceedings, decisions and decree aforesaid manifest error has intervened to the prejudice of the appellants, to wit: [72]

1. The Court erred in not holding that, under the terms of the will dated May 25, 1893, of James Gay, deceased, the net rents, or, their actuarial value as of the testator's death on May 28, 1893, derived from subleases of certain leasehold property held by the testator, at the time of his death, consisting of about 2500 acres of land situate at Mokuleia, Island of Oahu, for a term of 50 years from May 1, 1884, (hereinafter referred to as the "Mokuleia lease") form part of the *corpus* of testator's estate given in trust for testator's grandchildren, to wit: the minor respondents above-named appellants.

2. The Court erred in *find* and holding that, under the terms of said will, whatever sums the trustees received for the said Mokuleia lease, to wit: the net rents derived from the sublease thereof, were income and that the life tenants (being all but one of testator's children named in his will

and the issue of one deceased child) were entitled to receive it.

3. The Court erred in not holding under the terms of the said will that it was open to the trustees upon receiving proper security to give the life tenants the use of the net rents as they were received from subleases of the land comprised in the said Mokuleia lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of reinvestment of the net rents which comprised part of the *corpus* of the said estate.

4. The Court erred in not holding under the terms of said [73] will that the trustees thereof, in subleasing all the land comprised in the said Mokuleia lease for the unexpired period except the last few days of the said term thereof, in effect sold the said Mokuleia lease at a price payable by installments, such price being the net annual sums received for same; and that the amounts so received and to be received from such subleases or their value as of testator's death form part of the *corpus* of testator's estate.

5. The Court erred in finding and holding under the terms of the said will that the trustees thereof did not by subleasing all the land comprised in the said Mokuleia lease, in effect, sell the said Mokuleia lease at a price to be paid for in installments; and, that the net amounts received from such subleases were not *corpus* but income of the estate payable to the life tenants.

6. The Court erred in not holding under the terms of the said will that the net rents amounting in the aggregate to $34,329.24, received from subleases of certain leasehold property held by the testator at the time of his death, consisting of about 1200 acres of land situate at Humuula, Ookala, Island of Hawaii, for a term of 25 years extended for a further term of 7 years and ultimately expiring March 1, 1908 (hereinafter referred to as the "Ookala lease"), all formed part of the *corpus* of testator's estate.

7. The Court erred in finding and holding under the terms of said will that only $20,668.35, a part of $34,329.24, the net rents received by the trustees from subleases of the land comprised in the said Ookala lease, should have been invested [74] as capital or *corpus* of the estate; and that the balance of $13,660.89, a part of said net rents, should be distributed to life tenants as income.

8. The Court erred in not holding under the terms of said will that it was open to the trustees, upon receiving proper security, to give the life tenants the use of the net rents as they were received from subleases of the land comprised in the said Ookala lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of reinvestment of the net rents which comprised part of the *corpus* of the said estate.

9. The Court erred in finding and holding under the terms of said will that the trustees at the

inception of the trust might not (by analogy to a direct gift of money for life) have paid the rents as received to the tenants for life upon receiving reasonable security to preserve the fund for the remaindermen, and that the only course which the trustees had an absolute right to pursue was to promptly convert the wasting assets into an authorized permanent investment and pay the income derived therefrom, whatever it might be, to the life tenants and preserve the capital amount for the remaindermen.

10. The Court erred in finding the issues on the construction of the will for the life tenants, respondents above named other than said minor respondents.

11. The Court erred in not finding the issues upon the construction of the will for the minor respondents appellants. [75]

12. The Court erred in decreeing that the decree appealed from should be affirmed.

13. The Court erred in not decreeing that the decree appealed from should be set aside.

14. The decree is against the manifest intention of the testator as expressed in his will.

15. The decree is against the manifest weight of evidence.

16. The decree is contrary to law.

WHEREFORE appellants pray that the decree of the Supreme Court of the Territory of Hawaii may be reversed and remanded with directions to the Supreme Court of the Territory of Hawaii to enter a decree that the net rents received and to

be received by the trustees of the will of James Gay, deceased, or the value thereof, from the Mokuleia lease and the Ookala lease, are part of the *corpus* of the estate of James Gay, deceased, and should be restored thereto, or security for the restoration thereof taken from the life tenants, and should be held in trust for the grandchildren of the testator as provided in his said will.

Dated at Honolulu, Territory of Hawaii, this 28th day of June, 1922.

HARRY EDMONDSON,
Guardian *Ad Litem* for Petitioners-Appellants.

[76]

Received a copy of the within written petition for appeal and assignment of errors on appeal, and receipt of a true copy thereof this 28th day of June, 1922, is hereby admitted.

W. L. STANLEY,
Attorney for Complainants-Appellees.
W. O. SMITH and
L. J. WARREN,
Attorneys for Respondents Other than Minor Respondents-Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Petition for Appeal and Assignment of Errors on Appeal. Rec'd. and filed in the Supreme Court June 30, 1922, at 10:12 o'clock A. M. Robert Parker, Jr., Deputy Clerk. [77]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Allowing Appeal.

Upon reading and filing the foregoing petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon consideration of the assignment of errors presented and filed therewith,—

IT IS ORDERED that the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby allowed.

Dated at Honolulu, Territory of Hawaii, this 30th day of June, 1922.

[Seal] E. C. PETERS,

Chief Justice, Supreme Court of the Territory of Hawaii. [78]

Received a copy of the within written order allowing appeal and receipt of a copy is hereby admitted this 30th day of June, 1922.

W. L. STANLEY,

Attorney for Complainants-Appellees.

W. O. SMITH,

L. J. WARREN,

Attorneys for Respondents-Appellees, Other Than Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Allowing Appeal. Rec'd and filed in the Supreme Court June 30, 1922, at 11:45 o'clock A. M. Robert Parker, Jr., Deputy Clerk. [79]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS that Harry Edmondson, of the City and County of Honolulu, Territory of Hawaii, as principal, and the United States Fidelity and Guaranty Company, a corporation duly authorized to carry on a bonding business in the Territory of Hawaii, as surety, are held and firmly bound unto H. Focke and

H. M. von Holt, trustees under the will and of the estate of James Gay, deceased, complainants above named, and Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay and Frida Gay, some of the respondents above named, hereinafter called the appellees, in the sum of $500.00 to be paid to said appellees, to which payment well and truly to be made we bind ourselves and our assigns jointly and severally by these presents. [80]

THE CONDITION OF THIS OBLIGATION IS AS FOLLOWS:

WHEREAS the minor respondents above named by Harry Edmondson, their guardian *ad litem,* appellants, have taken an appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the said Supreme Court entered on the eighth day of March, A. D. 1922, in the above-entitled suit;

NOW, THEREFORE, if the above-named appellants shall prosecute the said appeal to effect and answer to all costs that may be adjudged if they shall fail to make good their appeal then this obligation is to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 30th day of June, 1922.

HARRY EDMONDSON,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
By HERMAN LUIS, (Seal)
Attorney in Fact,
Surety.

Approved as to form, sufficiency and amount this 30th day of June, 1922.

[Seal] E. C. PETERS,
Chief Justice of the Supreme Court, Territory of Hawaii. [81]

Service of the within appeal bond and receipt of a copy is hereby admitted this —— day of June, A. D. 1922.

_____,
Attorney for Complainants-Appellees.

_____,
Attorney for Respondents-Appellees, Other Than Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Appeal Bond. Rec'd and filed in the Supreme Court June 30, 1922, at 4:00 o'clock P. M. Robert Parker, Jr., Deputy Clerk. [82]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Citation.

THE UNITED STATES OF AMERICA,—ss.

The President of the United States of America to H. Focke and H. M. von Holt, Trustees Under the Will of the Estate of James Gay, Deceased, and Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay, and Frida Gay, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the Supreme Court of the Territory of [83] Hawaii and filed in the Clerk's office of said court on the 30th day of June, A. D. 1922, in the cause wherein Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Llewellyn Napela Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, by Harry Edmondson, their guardian *ad litem,* are appellants and you are appellees, to show cause, if any, why the decree rendered against said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the hand and seal of the Honorable the Chief Justice of the Territory of Hawaii this 1st day of July, in the year of our Lord one thousand nine hundred and twenty-two.

E. C. PETERS,

Chief Justice, Supreme Court of Territory of Hawaii.

[Seal] Attest: ROBERT PARKER, Jr.,
Deputy Clerk of the Supreme Court. [84]

Service of the within citation and receipt of a copy is hereby admitted this 1st day of July, A. D. 1922.

W. L. STANLEY,
Attorney for Complainants-Appellees.
W. O. SMITH,
L. J. WARREN,
Attorneys for Respondents-Appellees, Other Than Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii, H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Citation. Rec'd and filed in the Supreme Court, July 1, 1922 at 11:42 o'clock A. M. Robert Parker, Jr., Deputy. [85]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. VON HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a

Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including September 30, 1922, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this Court be and they are hereby allowed until and including the 30th day of September, 1922, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all [86] other papers as part of said record.

Dated at Honolulu, T. H., July 15, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: ROBERT PARKER, Jr.,

Deputy Clerk, Supreme Court. [87]

Receipt of a copy of the within written order is hereby admitted this 17th day of July, 1922.

W. L. STANLEY,
By A. H.
Attorneys for Complainants-Appellees.
SMITH & WARREN,
Per R. A. V.,
Attorneys for Respondents-Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time to and Including September 30, 1922, for Preparation and Transmission of Record. Rec'd and filed in the Supreme Court, July 17, 1922, at 1:50 o'clock P. M., and Issued for Service. Robert Parker, Jr., Deputy. Returned at 3:55 o'clock P. M. July 17, 1922. Robert Parker, Jr., Deputy Clerk. [88]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN

FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including November 30, 1922, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this Court be and they are hereby allowed until and including the 30th day of November, 1922, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all [89] other papers as part of said record.

Dated at Honolulu, T. H., September 18th, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: ROBERT PARKER, Jr.,

Deputy Clerk, Supreme Court.

Consented to:

W. O. SMITH,

Per R. A. V.,

L. J. WARREN,

Per R. A. V.,

Attorneys for Respondents–Appellees. [90]

Service of copy of the within order is hereby admitted this 18 day of Sept., 1922.

W. L. STANLEY,

Per R. A. V.,

Attorney for Complainants-Appellees.

W. O. SMITH,

Per R. A. V.,

L. J. WARREN,

Per R. A. V.,

Attorneys for Respondents–Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time to and Including November 30, 1922, for Preparation and Transmission of Record. Rec'd and filed in the Supreme Court, Sept. 18, 1922, at 2:45 o'clock P. M. Robert Parker, Jr., Deputy Clerk. [91]

In the Supreme Court of the Territory of Hawaii.
No. 1348.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Stipulation Re Taking Appeal Under Rule 75 (Supreme Court Equity Rules).

Doubt having arisen as to the proper method by which an appeal should be taken in an equity case from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals of the Ninth Circuit, the parties to the above-entitled cause do hereby state their understanding that such

a case is governed by Rule No. 75 of the Equity Rules of the Supreme Court of the United States, and do hereby stipulate that such appeal may be taken as provided by said Rule No. 75.

Dated, at Honolulu, T. H., November 13, 1922.

W. L. STANLEY,
Counsel for Complainants (Appellees).
WILLIAM O. SMITH and
L. J. WARREN,
Counsel for Life Tenants, Respondents (Appellees).
H. EDMONDSON,
Counsel for Minor Respondents (Appellants).

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Defendants. Stipulation. Rec'd and filed in the Supreme Court, Nov. 15, 1922, at 10:50 o'clock A. M. Robert Parker, Jr., Deputy Clerk. H. Edmondson, Honolulu, T. H., Attorney for Minor Respondents. [92]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY,

ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including December 30, 1922, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this Court be and they are hereby allowed until and including the 30th day of December, 1922, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all [93] other papers as part of said record.

Dated at Honolulu, T. H., November 17, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,

Clerk, Supreme Court.

Consented to:

_____,

Attorney for Complainants-Appellees.

_____,

Attorney for Respondents-Appellees. [94]

I certify that I served true copies of the within order on W. L. Stanley, attorney for complainants-appellees, and on D. O. Smith & L. J. Warren, attorneys for respondents-appellees by leaving said copies with a clerk in their offices this 17th Nov., 1922.

H. EDMONDSON,

Attorney for Appellants.

Service of a copy of the within order admitted this 17th day of November, 1922.

_____,

Attorney for Complainants-Appellees.

_____,

Attorney for Respondents-Appellees.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time for Preparation of Record. Filed November 17, 1922 at 11:55 A. M. J. A. Thompson, Clerk. [95]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including February 15, 1923, for Preparation and Transmission of Record.

Upon the application of counsel for the minor respondents-appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the minor respondents-appellants herein and the Clerk of this

Court be and they are hereby allowed until and including the 15th day of February, 1923, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, [96] California, the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all other papers as part of said record.

Dated at Honolulu, T. H., December 18, 1922.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,

Clerk, Supreme Court. [97]

I certify that I have served true copies of the within order upon Mr. W. L. Stanley, attorney for complainants-appellees, and on Messrs. W. O. Smith and L. J. Warren, attorneys for respondents-appellees, by leaving same at their office this 18th day of December, 1922.

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke, et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time. Filed December 18, 1922, at 1:45 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [98]

In the Supreme Court of the Territory of Hawaii.

No. 1348

H. FOCKE and H. M. von HOLT, Trustees under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Praecipe for Transcript of Record.

To James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare and certify a transcript of the record in this, the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore allowed, and include in said transcript the following pleadings,

proceedings, opinions, judgments, exhibits, affidavits and papers on file in said cause, to wit:

A. In record No. 1273:

(1) Complainants' petition and verification thereof by H. Focke, and attached thereto: Copy of will of James Gay dated May 25, 1893; [99]

(2) Order dated August 7, 1919, appointing guardian *ad litem* for minor respondents;

(3) Answer of respondents other than the minor respondents dated November 26, 1919;

(4) Amended answer of minor respondents dated January 23, 1920;

(5) Decree of Honorable Jas. J. Banks dated and entered in Circuit Court on April 6, 1920;

(6) Opinion of the Supreme Court of the Territory of Hawaii filed April 5, 1921;

(7) Notice of decision on appeal dated May 27, 1921, by the Supreme Court to the Honorable Jas. J. Banks, Judge of the First Circuit Court of the Territory of Hawaii;

B. In record No. 1348:

(8) Decree of Honorable Jas. J. Banks entered and filed in the Circuit Court on August 1, 1921;

(9) Opinion of the Supreme Court filed February 28, 1922;

(10) Decree filed in the Supreme Court March 8, 1922;

(11) Petition of minor respondents by their guardian *ad litem* for appeal, with affidavit of H. Edmondson attached;

(12) Order allowing appeal;

(13) Appeal bond;

(13b) Stipulation that appeal be taken under Rule 75 (Supreme Court Equity Rules), filed November 15, 1922; [Interlined with permission of Chief Justice Peters with consent of L. J. Warren this 16th Feb., 1923.—H. E.]

(14) Statement of evidence as and when approved by the Supreme Court or a Justice thereof;

(15) Certificate of Justice re statement of evidence as and when filed.

You will also please annex to and transmit with the record the original assignment of errors on appeal and the original Citation dated July 1, 1922, with admission of service of copies thereof by W. L. Stanley, attorney for complainants-appellees, and W. O. Smith and L. J. Warren, Attorneys for respondents-appellees, also originals of the following orders:

Order filed July 15, 1922, extending time for preparation and transmission of record to September 30, 1922;

Order filed September 18, 1922, extending time for preparation and transmission of record to November 30, 1922; [100]

Order filed November 17, 1922, extending time for preparation and transmission of record to December 30, 1922;

Order filed December 18, 1922, extending time for preparation and transmission of record to February 15, 1923.

Also your certificates under seal stating in detail the cost of the record and by whom the same was paid.

Dated, Honolulu, Hawaii, December 18, 1922.

Respectfully,

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents-Appellants.

Service of a copy of the foregoing praecipe is admitted this 18th day of December, 1922.

W. O. SMITH,
L. J. WARREN,
Attorneys for Life Tenants-Appellees.
W. L. STANLEY,
By WM. T. RAWLINS,
Attys. for Complainants. [101]

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Praecipe for Transcript of Record. Filed December 18, 1922, at 1:45 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [102]

In the Supreme Court of the Territory of Hawaii.

No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY et al.,

Respondents.

Additional Praecipe of Appellees.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

In conjunction with and as a part of the transcript of the record upon the appeal of the minor respondents and their guardian *ad litem* in the above-entitled cause, respecting which appellants have filed their praecipe with you on December 18, 1922:

You will please also prepare and certify the following additional portions of the record, including them in their chronological order in said record, namely:

(4a) The decision of the Honorable James J. Banks, Circuit Judge, dated and filed (in record No. 1273) April 2, 1920;

(6a) The opinion of the Supreme Court of the Territory of Hawaii, on rehearing, dated and filed (in record No. 1273) May 7, 1921;

(7a) The decision of the Honorable James J. Banks, Circuit Judge, dated and filed (in record No. 1348) August 1, 1921;

(13a) This praecipe.

Dated: Honolulu, T. H., December 26, 1922.

Respectfully,

WILLIAM O. SMITH,

LOUIS J. WARREN,

Attorneys for Life Tenant Respondents-Appellees.

[103]

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke and H. M. von Holt, Trustees Under the Will and of the Estate of James Gay, Deceased, Complainants, vs. Llewellyn Napela Gay et al., Respondents. Appellees' Praecipe. Filed December 26, 1922, at 3:35 P. M. J. A. Thompson, Clerk.

Service of a copy of the foregoing Praecipe is admitted this 26th day of December, 1922.

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents-Appellants.

W. L. STANLEY,

By W. T. R.

WILLIAM T. RAWLINS,

Attorneys for Complainants-Appellees. [104]

In the Supreme Court of the Territory of Hawaii.
No. 1348.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Order Extending Time to and Including April 5, 1923, for Preparation and Transmission of Record.

Upon the application of counsel for the Minor Respondents-Appellants herein, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the Minor Respondents-Appellants herein and the Clerk of this Court be and they are hereby allowed until and

including the 5th day of April, 1923, within which to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, [105] the record in the above-entitled cause on appeal, together with petition for appeal, assignment of errors and citation, and all other papers as part of said record.

Dated at Honolulu, T. H., February 2, 1923.

E. C. PETERS,

Chief Justice, Supreme Court, Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,

Clerk, Supreme Court.

Approved February 2, 1923.

_____,

Attorneys for Life Tenants Respondents-Appellees.

[106]

I hereby certify that I served true copies of the within order upon Messrs. W. O. Smith and L. J. Warren, attorneys for the life tenants, appellees, and upon Mr. W. L. Stanley, Attorney for complainants, by leaving copies in their offices this 2d day of February, 1923.

H. EDMONDSON,

Guardian *Ad Litem* and Attorney for Minor Respondents.

[Endorsed]: No. 1348. In the Supreme Court of the Territory of Hawaii. H. Focke et al., Complainants, vs. Llewellyn Napela Gay et al., Respondents. Order Extending Time to and Including April 5, 1923, for Preparation and Transmission of

Record. Filed February 2, 1923, at 2:50 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [107]

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

BILL FOR INSTRUCTIONS.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Statement of Evidence.

James Gay made a will which was admitted in evidence, a true copy of which is attached to the petition forming part of the record. (To avoid duplication of printing, a copy of the will referred to is incorporated herein by reference as fully as if it were recopied here.)

Testimony of Herman Focke, for Complainants.

HERMAN FOCKE, one of the trustees under the testator's will, was called by the complainants as a witness, and testified:

I have resided in Honolulu nearly forty years and knew James Gay in his lifetime, and for a good many years before his death on May 28, 1893. He was living on his ranch at Mokuleia [108] where for about nine years before and until his death he was personally conducting a ranching business, consisting of horses and cattle. When I was appointed one of the executors of his estate his property consisted of:

(a) A leasehold (hereinafter called the "Mokuleia lease") made to him by J. P. Mendonca, dated May 27, 1884, of about 2500 acres of land at Mokuleia, Island of Oahu, for a term of 50 years from May 1, 1884, expiring May 1, 1934, at an annual rent of $1,250.00 and taxes;

(b) A leasehold made to him by the Commissioner of Crown Lands of the Government of Hawaii, dated March 1, 1876, of land at Humula, Ookala, Island of Hawaii, for a term of 25 years expiring March 1, 1901, under which he had made a sublease to the Ookala Sugar Company to expire with the head lease in 1901, under which he was receiving and to receive, as rent, 5% of the sugar produced from the land. Before his death he obtained a seven years' extension from the Government until March 1, 1908, at a nominal rent or rent free,

(Testimony of Herman Focke.)

but the sublease or sugar agreement with the Ookala Sugar Company was not extended in his lifetime. In July, 1900, the trustees of his estate extended it to the end of the additional term—1908;

(c) Cattle, horses, mules, farming implements and household furniture, valued in this estate inventory at his death at about $2,310.00; and

(d) Cash in my hands, as his agent, amounting to $816.59.

Gay formerly conducted a sheep ranch at Humuula. Then he sold that out, and retained for himself that part of [109] the Ookala leased land which he had contracted or subleased to the Ookala Sugar Company and which was suitable for cane land, about 1200 acres.

The values in the inventory as to the leaseholds were, for the Mokuleia lease $7,500.00, and for the Ookala lease $5,000.00. These were placed on them by me according to my best judgment after conferring with the estate's attorney, Cecil Brown, and Tom Gay, decedent's brother, a practical cattleman. The value so stated for the Ookala lease was as it then stood, in view of the fact that the agreement with the Ookala Sugar Company was producing about $650.00 a year; that was the correct value of the Ookala lease agreement with the Ookala Sugar Company. Mr. Gay left no real estate. The indebtedness of his estate was about $5,000.00, consisting of outstanding notes and the funeral expenses.

(Testimony of Herman Focke.)

At the time of Mr. Gay's death his family consisted of a wife and seven children (three sons and four daughters), all living with him on the ranch premises and all of whom, except one daughter, are still living and are named as respondents in this case. All of the minor respondents are grandchildren of the testator. At the time of his death his youngest child was three or four years old and his eldest about sixteen years.

The testator conducted the ranch, on the greater part of the Mokuleia premises, and subleased the remainder to others, and at the time of his death he was receiving from subleases of portions of Mokuleia a total gross annual rental of $2,723.50, out of which he was paying the head rent of $1,250.00. By the terms of this head lease he was obligated to cut lantana (a noxious shrub then prevalent) at heavy expense or there was danger of losing the head lease. [110]

The family continued to reside at Mokuleia until Mr. Gay died, in April, 1895, when the children went to Honolulu. After Gay's death the trustees continued to carry on the testator's ranching business along the same general lines as he had done in his lifetime, until some time in the year 1906 when the livestock and movable assets used in connection with the ranching business were sold by the trustees, realizing $4,065.00 net. This sum has since been invested and held by the trustees as *corpus* of the estate. In the meantime, on December 9,

(Testimony of Herman Focke.)

1898, a portion of the Mokuleia lease containing an area of about 800 acres was subleased by the trustee to B. F. Dillingham for the balance of the term of the head lease at a rental of five per cent of the sugar (or the proceeds thereof) grown thereon. This sublease was assigned to the Waialua Agricultural Company and on July 2, 1902, the trustee subleased to that Company for the remainder of the term of the head lease 65 acres more of the Mokuleia lease at a like sugar basis rental. In 1906 when the ranch stock was sold the rest of the Mokuleia lease was subleased by the trustees to others for fixed annual rentals and for the remainder of the term of the head lease. All of the Mokuleia lease is now sublet.

On assuming charge of the estate, I found no books of the testator showing an account of the returns to him from the ranch, or his expenses in connection with the ranch.

From my accounts I find that for the first seven years of the trust the average returns per annum on the Mokuleia property were $999.13, after including the income from all sources at Mokuleia and the income from the subleases and rights of way and from the sales and disposition of cattle, stock and [111] ranch profits, and deducting therefrom expenses of $84,424.00. In 1893, the year of the testator's death, the amount received by the executors as returns from the Ookala Sugar Company was $642.79, and the net return from the same source for the year preceding the testator's death

(Testimony of Herman Focke.)

was $643.90. During the first seven years of the trust the average amount received by the trustees from the Ookala property was $1,383.54.

The first returns of income under the sublease made to Waialua Agricultural Company came in 1900 and 1901, up to which time the average income from Mokuleia was $999.13 as stated, and $1300.00 was the average income from the Ookala property.

Some of the subleased lands (not those subleased to Waialua Agricultural Company) were abandoned in 1905 and we could not get any other tenants. There were rice lands, of which the soil was unsuitable, poho (meaning lost, or lost in value), porous, used too much water, and the tenants could not make it pay, and when P. M. Pond made us an offer to sublease we accepted it, and under this sublease to him the estate secured a greater income than if it had continued to be conducted as a ranching business through the trustees. (The Court denied a motion by the guardian *ad litem* to strike the matters stated (in substance) in this paragraph as being irrelevant, incompetent and immaterial.)

Since the inception of the trust and until the filing of the bill in this case the trustees have paid out all of the income of the estate, first to the widow, Mrs. Gay, and afterwards to the children of Mr. Gay, until I was recently advised by the trustees' counsel, W. L. Stanley, in an opinion rendered in July, 1919, that there was some question as to

(Testimony of Herman Focke.)
whether the trustees' course in so dealing with the income was correct or not. [112]

(On cross-examination this witness gave figures, without details, as to realizations from the Ookala lease, from 1893 to 1906, which are not included here because they were incomplete on this first hearing and were on the second hearing brought out in detail, gross and net, as appears in the statement appearing below as a copy of Respondents' Minors Exhibit "A.")

The total income of the Mokuleia property from the inception of the trust down to 1907, was $90,-690.63, including the ranch business and everything with it. The net for those years was $6,266.37. All that the life tenants got from 1893 to 1907 was practically $6,000.00, not including the Ookala lease. The trustees have increased the values of these leaseholds enormously, by subleasing them, over the way they would have been able to do if operating it as a ranch.

In view of the abnormal high price of sugar during the last five years (the witness was testifying in January, 1920), the returns have been greater during those years than at any time before.

I can't say offhand how it was that the Mokuleia expenses were so large as $84,424.00, but one large item was the cleaning of the lantanas which cost us tholsands of dollars at that time, when the whole pasture lands all over the Island were covered with thick lantanas and it was destroying all the

(Testimony of Herman Focke.)

pastures, the pastures could not, we could not sell them. I would try to keep the lantanas out and there was a question whether we were obliged to do it or not under the terms of the lease, but as trustees we would not run the risk that Mr. Mendonca might jack us up and bring this suit against us for not having kept the lands clean of lantanas. That was a very great expense, and every yearly account to the courts mentions a sum we had to spend. [113]

The following figures respecting rents from the Mokuleia lease are incorporated in this statement of evidence, by order of the Judge signing same, over the objection of counsel for the life tenant appellees that the same are not material to the issues on this appeal, namely:

Year.	Fixed Annual Rents.	Rents being portion of sugars produced.
1894	$2573.50	None
1895	2573.50	None
1896	2573.50	None
1897	2573.50	None
1898	3153.50)	
1899	3153.50)	
1900	3153.50)	
1901	3153.50)	
1902	3153.50)	$44,856.62
1903	3153.50)	or an average of $4,984.06
1904	3153.50)	per annum
1905	2077.50)	
1906	2077.50)	
1907	2077.50	9,418.79

Year.	Fixed Annual Rents.	Rents being portion of sugar produced.
1908	2890.00	5,391.42
1909	2890.00	11,574.67
1910	2965.00	6,889.14
1911	3290.00	14,290.74
1912	3290.00	4,774.19
1913	3852.50	12,174.31
1914	4040.00	5,664.70
1915	4040.00	15,966.49
1916	4040.00	12,974.38
1917	4040.00	17,456.30
1918	4040.00	15,765.30
1919	4040.00	21,817.76

Total fixed rent—
82,018.50

Total sugar rentals.....199,015.26
82,018.50

Grand Total 281,033.76

The above total of $281,033.76 is approximate and is subject to correction. From it must be deducted the rent paid under the head lease of $1,250.00 for 26 years, namely, $32,500.00, leaving approximately $248,533.76 from which would also have to be deducted sundry other charges for administering the trust and incidental purposes, none of which appear in evidence. [114]

Testimony of T. H. Petrie, for Complainants.

Mr. T. H. PETRIE, called as a witness by the guardian *ad litem,* and (over the objection of counsel for the life tenants, that the present value of the Mokuleia lease is immaterial and cannot affect the question of whether or not the trustees should have converted this lease into cash on the testator's death), testified as follows:

I am a director of Castle & Cooke, Ltd., agents for Waialua Agricultural Company which now has some 865 acres under lease from the trustees of the James Gay estate at Mokuleia. I am acquainted with the past record of that lease so far as the Waialua Sugar Company is concerned. I have the figures from 1905 to 1919, as the results obtained from the cultivation of those lands. I have gone into the value of this leasehold as of the present time only in a general way. I have considered the two Waialua subleases and the other subleases—all producing a fixed rent of $4,040.00 and one-twentieth of the sugar.

"Q. What value had you put on those leaseholds as of the present time (January 27, 1920)?

A. In answering that question I want it understood, if the Court please, that I am not answering from the standpoint of an expert on leasehold values. I am answering that question from the standpoint of what I would be willing to pay for this leasehold if it was offered for sale this morning. I value it at $90,000.00—I would offer $90,-

(Testimony of T. H. Petrie.)

000.00 for it, . . . speaking for the Waialua Agricultural Company of course."

On cross-examination by counsel for the life tenants Mr. Petrie testified further: [115]

This figure of $90,000.00 covers all of these subleases, in some of which the Waialua Agricultural Company is not at present interested. I haven't given any consideration to the value of the original Mendonca lease, I haven't seen that lease except to know what the rental is. The figure is confined entirely to the amount I would offer for the series of subleases that were mentioned, as of the present time. I haven't considered it from any standpoint of the previous years. This figure of $90,000.00 would be to buy the whole thing,—with all of the subleases.

"Q. That then would be practically the elimination then of any profit to the Gay estate as the holder of the principal lease?

A. Exactly, the lease would be from Mendonca to us, practically.

Q. In that way eliminate or cut out any obligation of the Waialua Agricultural Company to pay rent on the present basis under its subleases?

A. Exactly, yes.

Q. What consideration have you had in mind in naming that figure of ninety thousand dollars as the amount you would offer?

A. The results from the time that we have used and cultivated the lands that we have occupied on

(Testimony of T. H. Petrie.)

which rentals that have been paid on the other basis, and our judgment as to what we might expect for the future in so far as the cultivation and sale of sugar is concerned, practically all of that land outside of the lease to the Chinamen is cultivated in sugar cane.

Q. That then involves to some extent a matter of judgment as to what the future will develop for sugar? A. Exactly.

Q. What the returns of sugar will be hereafter?

A. Yes. [116]

Q. Will you please tell us what you consider would be the value of this (Mokuleia) lease from the standpoint of the Gay estate,—the trustees of the Gay estate?

A. No, I am not prepared to answer that.

Q. You are not then assuming to set any figures except what the Waialua Agricultural Company would offer? A. Exactly."

On cross-examination by counsel for the trustees, Mr. Petrie further testified:

In 1893, when Mr. Gay died, the sugar industry in the Islands and on this Island was very largely undeveloped; in 1893 the Ewa Sugar Company was struggling for its existence, and it was a question whether Ewa would go under or not,—in 1892 or 1893. At that time the Oahu Sugar Company had not been started; the Oahu Railway, which to a great extent made possible three large plantations on the Ewa side of this Island was, I think, strug-

(Testimony of T. H. Petrie.)

gling for an existence. At the time of Mr. Gay's death it did not extend as far as Ewa (from Honolulu). The present Waialua Agricultural Company had not been started, but was evolved some five or seven years later out of a one-horse concern run by the Halstead Brothers. Waialua Agricultural Company was organized in 1898, developed and to take in all the undeveloped lands in that district including the Mokuleia section. That is when it was taken over and leased by the Waialua Agricultural Company. I think that was the result, in a very large measure, of the treaty of annexation of the Islands in 1898. It was at that same period that Waialua and other large sugar enterprises were started throughout these Islands. [117]

(A motion to strike the opinion of Mr. Petrie as to the value of the Mokuleia lease was denied.)

Testimony of Chas. T. Wilder, for Complainants.

Mr. CHAS. T. WILDER, tax assessor since 1908 for the District where the Mokuleia leasehold property is situate, called as a witness by the guardian *ad litem,* over the objection of counsel for the life tenants that the point of present value was immaterial, testified:

"If the average net income would be the same for the next fourteen years, and it is on the past 13 years according to these figures you have given me, if money is worth no more 14 years later than it is now on a basis of these numbers, that (the present value of the Mokuleia lease) would be $87,-

(Testimony of Chas. T. Wilder.)

359.37. In other words, the lease in 14 years would take in $197,511.12, which, discounted at the present time for 14 years, would amount to this, $87,359.37, or, in other words, $87,359.37, invested to-day at 6% interest would purchase $197,511.58 in 14 years."

On cross-examination by counsel for the life tenants Mr. Wilder testified further:

"Q. Would you wish to be understood as saying in your opinion that is the fair market value of this lease?

A. Personally I wouldn't take any chance fourteen years from now on that value. The last four or five years' rentals have been very large. There is no guaranty that in ten years they will be that large.

Q. In other words you have just made hypothetical calculations as to the present value of this assured income?

A. I will qualify my statements. If the present price of sugar remains the same, averages the same, and the price of money the same, that would be what it would do. [118]

Q. Your personal opinion of the value of the property doesn't enter into it? A. No."

The following additional evidence was taken at the second hearing before the Circuit Judge, following the rendition of the opinion of the Supreme Court of the Territory filed April 5, 1921.

Testimony of Herman Focke, for Complainants (Recalled).

Mr. HERMAN FOCKE was recalled as a witness and, on direct examination by the guardian *ad litem,* testified as follows:

I recall that $5,000.00 was the value placed on the Ookala leasehold in the estate inventory. That was the value submitted to the Court at the time. It agreed with my best judgment at the time. We had to place a value on it, and it is hard for me to say now on what we based it. "I suppose that —I know that so much sugar was received a year and I suppose that we took the—eight times of the rental; that was, in those years, about the value of the property."

(The witness then identified a statement of the rentals received under the Ookala lease, gross and net,—which was received in evidence as Respondents' Minors Exhibit "A,"—from the inception of the trust until the lease finally expired, showing a total net sum of $34,329.24, of which statement the following is a full and true copy:)

Respondents' Minors Exhibit "A."

Date.			Rents.	Taxes.	Freight.	As appears in Estate's accounts of.	Net.
1893–4	June 9		642.79	40.		June 30, 1894	602.79
1894–5	Aug. 7	387.00					
	Oct. 1	464.63	851.63	40.		" 1895	811.63
1895	Aug. 7	257.06					
1896	June 30	1612.44	1869.50	40.		" 1896	1829.50
1896	Aug. 19		1377.44	35.		" 1897	1342.44
1897	July 31		412.31	35.		" 1898	377.31
1898	Oct. 28		1836.45	30.		" 1899	1806.45
1899	Nov. 21		2794.65	25.		" 1900	2769.65
1900	Nov. 3		4528.59	25.		" 1901	4503.59

Forward— [119]

Date.		Rents.	Taxes.	Freight.	As appears in Estate's accounts of.	Net.
					Forward—	
1901	Oct. 11	2956.77	25.		June 30, 1902	2931.77
1902	Sep. 29	828.18	25.		" 1903	803.18
1903	Dec. 31	1515.01	25.		" 1904	1490.01
1904	Nov. 5	1875.56	25.		" 1905	1850.56
1905	Nov. 21	948.13	25.		" 1906	923.13
1906	Nov. 8	4885.95	12.50	209.	" 1907	4664.45
1907	——	——	——	——	" 1908	——
1908	Nov. 24	7630.28	7.50		" 1909	7622.78
		$34,953.24	415.00	209.		$34,329.24

Total amount of rents received.....$34,953.24
Less taxes and freight 624.00

Net $34,329.24

(Counsel for the life tenants then made Mr. Focke their own witness, and the following is here quoted from the transcript:)

"Mr. WARREN.—I would like to make this explanatory statement in the record, also, that it will be recalled as pretty well intimated by the Supreme Court that, in dealing with the Ookala lease, your Honor didn't go into that as a separate issue particularly,—discussed the case from a very general standpoint and dealt principally with the Mokuleia lease.

The COURT.—Yes, that being the matter that was presented to me.

Mr. WARREN.—Yes, your Honor. So that the record which went before the Supreme Court contained practically nothing of the nature that I now wish to have your Honor receive into this record in order that we may present it, as a matter of record before the Supreme Court, in an appeal as I assume will be taken from whatever order your Honor makes here. The surrounding [120] facts and circumstances attendant upon the execution of this will by Mr. Gay. There is nothing in the record, and we did not anticipate the importance at the first hearing of indicating to your Honor that Mr. Gay, at the time he made this will and used the term 'rents, issues and profits' of his estate to go to his children for life, that he then knew he was dying. We want to prove facts that will

(Testimony of Herman Focke.)

tend—that will show and indicate that Mr. Gay, when he made that will, was dying, or believed he was dying, and, therefore, could not have used the word 'rent' in that will with respect to the possible after acquisition of real estate in fee, and that his use of the word 'rents' in that will had respect to the only property he owned at the time concerning which he was making his will, namely, these leaseholds. This might have a very strong bearing on the question whether or not the word 'rents' in that will should be held to apply to leaseholds, if the Ookala lease did not—would not be converted.

The COURT.—You may go ahead.

Mr. EDMONDSON.—May it please the Court, I would like to make an objection. The decision of the Supreme Court says: (Reads.) In view of that decision I take it that this evidence would be ruled out.

The COURT.—I will have your objection noted.

Mr. EDMONDSON.—Might we have an exception to your Honor's ruling, to every question?

The COURT.—All right, you may do that, to save the record."

Mr. FOCKE then further testified as follows: [121]

I had known Mr. James Gay rather intimately for a considerable number of years before his death and was in attendance upon him or visiting him frequently during his last illness. I was present

(Testimony of Herman Focke.)

at the time this will was executed and on the day before.

"Q. Will you state to the Court what you know, from your own observation of Mr. Gay on the day he made the will and the day before he made the will, as to his then condition and any statements he made respecting himself and his condition?

A. Mr. Gay was very low indeed at that time. He was in a dying state, and on the day previous to the making of the will his physician who was attending him and who was a friend of Cecil Brown and myself came to me and said that he had told Mr. Gay and spoke to him about his affairs and so on, and in consequence, Mr. Gay wanted him to bring Cecil Brown up to make a new will. This was done on the 24th of May. I—the old will was in my possession; I was told to take it along. I went and Mr. Gay then gave his instructions to bring Mr. Brown. The next morning the new will was presented by Cecil Brown and signed in my presence by him and in the presence of the witnesses, who were Tom Gay, a brother of Gay, and the brother-in-law of Mr. Gay, Mr. Richardson, and Cecil Brown."

Mr. Gay told me to destroy the old will and to keep the new will. I have said that he was dying because I personally observed his condition. He had a hemorrhage and also an accident on the ranch; he was kicked by a horse and brought to town. He could not move and he was swelling. He had Bright's disease; dropsy set in and worked its

(Testimony of Herman Focke.)

way upwards and he was swelling inwards, up about the body. He was very weak and had coughing spells and spoke in a low voice. I myself obverved [122] the progress of his disease for several days prior to his death. On May 24th Dr. Trousseau came in and told me that he could not save him, that he was in a very low condition and spoke of the dropsy and of his Bright's disease.

"The COURT.—Q. Well, he was a very sick man and in a dying condition?

A. Yes, absolutely."

"Mr. WARREN.—I would like the record to show that the reason of this offer is because the Supreme Court specifically said 'under those circumstances,' indicating that they made that decision upon a record which didn't disclose this fact.

The COURT.—All right."

Testimony of H. D. Young, for Respondents.

Mr. H. D. YOUNG, called as a witness by the life tenants, testified as follows:

I am manager of the Audit Company of Hawaii, Limited.

(Here Mr. Edmondson conceded the qualifications of Mr. Young as an accountant and actuary. He was handed Respondents' Minors Exhibit "A," being a statement of gross and net rentals received under the Ookala lease above set forth, and then testified as follows:)

Given the case of James Gay dying in May of 1893, when he held the lease called the Ookala lease,

(Testimony of H. D. Young.)

under which, after his death, rents were received, gross and net, as shown by this statement.

Q. "Now, I want to ask you, Mr. Young, in your opinion as an accountant and actuary, given in this case: James Gay dying in May of 1893 held a lease called the Ookala lease, under which, after his death, rents were received in gross amounting as shown by this statement, a net amount as shown by this statement. Assuming that, as an actuary, you are asked to state the method [123] and means by which you would calculate the amounts that should be put by by the trustees to equal $34,329.24, at the expiration of the lease in 1908, what would be the correct method of determining the amounts that should be put by by the trustees each year out of these rents to arrive at that result, so that at the expiration of the lease the total full amount of rent actually received would be on hand?

Mr. EDMONDSON.—I object to the question, if the Court please, on the ground that the method of determining the value of this Ookala property is for your Honor to decide and not for a witness to decide.

(Argument.)

The COURT.—Objection is overruled."

I would say that the method and means to calculate the amount that should be put by by the trustees to equal $34,329.24 at the expiration of the lease in 1908 would be that of calculating the present value of each sum as it was received in each year as of the date of death. The sum total of

(Testimony of H. D. Young.)

those values would represent the total present value of all amounts so received as each installment was received and the present value would be withheld or deducted and reinvested at the usual rate of six per cent and each installment as invested accumulates interest which, as received from time to time, would be reinvested; and at the determination of the period the full sum required would be on hand. I have taken these figures shown by this statement as the net rentals for each year and made the following computations: [124]

(Here is given a full copy of the statement of calculations produced by the witness, the same being marked Life Tenants' Exhibit 1.)

Life Tenants' Exhibit No. 1.

Date.			Rents.	Taxes.	Freight.	As appears in Estate's accounts of.		Present worth on May 28, 1893.
1893–4	June 9		642.79	40.		June 30,	1894	602.79
1894–5	Aug. 7	387.00						
	Oct. 1	464.63	851.63	40.		"	1895	765.69
1895	Aug. 7	257.06						
1896	June 30	1612.44	1869.50	40.		"	1896	1628.25
1896	Aug. 19		1377.44	35.		"	1897	1127.13
1897	July 31		412.31	35.		"	1898	298.86
1898	Oct. 28		1836.45	30.		"	1899	1349.88
1899	Nov. 21		2794.65	25.		"	1900	1952.50
1900	Nov. 3		4528.59	25.		"	1901	2995.17
1901	Oct. 11		2956.77	25.		"	1902	1839.43
1902	Sep. 29		828.18	25.		"	1903	475.40
1903	Dec. 31		1515.01	25.		"	1904	832.00

Date.		Rents.	Taxes.	Freight.	As appears in Estate's accounts of.	Present worth on May 28, 1893.
1904	Nov. 5	1875.56	25.		June 30, 1905	974.85
1905	Nov. 21	948.13	25.		" 1906	458.77
1906	Nov. 8	4885.95	12.50	$209.	" 1907	2186.88
1907	——	——	——	——	" 1908	——
1908	Nov. 24	7630.28	7.50		" 1909	3180.75
		$34,953.24	415.00	$209.00		$20,668.35

Total amount of rents received.....$34,953.24
Less taxes and freight 624.00

$34,329.24

Present value of net rentals at date of death of Testator, May 28, 1893.....$20,668.35

Testimony of Herman Focke, for Respondents (Recalled—Cross-examination).

Mr. FOCKE was recalled as a witness and on cross-examination by counsel for the life tenants testified:

In reference to the value of $5,000 which was placed in the estate inventory for the Ookala lease, it was at that time customary to take eight years rental of a lease as about the value of the capital of the property. At that time we only had knowledge that the contract with the Ookala Plantation was to run for seven years only. The lease was extended by the Government before Mr. Gay died, but the contract with the Ookala Plantation [125] was not extended. In 1893 when we were not assuming to consider the Ookala contract as lasting more than seven years, the rent for that year was $642.79, represented in the value of the sugar for 1893. If on my knowledge of the conditions at that time the Ookala lease had been put up for sale, I don't think it would have fetched—I don't know now because all we know is that we received so much more sugar in later years. If I had been able at that time to know and have it before me the figures of rent that have come in I would certainly never have conceived of valuing that lease at $5,000.00.

(On July 29 Mr. Edmondson, referring to Mr. Gay's testimony giving the day before as above shown, asked and obtained leave of the Court to state the reasons for his objection and exception

thereto taken the day before as follows: "On the ground that the evidence is incompetent, irrelevant and immaterial and beyond the scope of this hearing.")

Approved this 16th day of February, 1923.

[Seal] ANTONIO PERRY,
Associate Justice Supreme Court of the Territory of Hawaii. [126]

Certificate of Justice Under Equity Rule 75 Re Statement of Evidence and Record Relating Thereto.

This is to certify that on the 16th day of December, 1922, the minor respondents by their guardian *ad litem,* appellants, lodged in the office of the Clerk of the Supreme Court of the Territory of Hawaii their proposed statement of the evidence to be included in the record on appeal in the above-entitled cause under paragraph (b) of Equity Rule 75, and on the same day gave due notice to the attorneys for the other parties of the lodgment of such statement of evidence, naming the time and place when and where they would ask the undersigned to approve such statement of evidence, such time and place so named being at least ten days after such notice.

Within the time limited therefor the life tenants respondents-appellees lodged their objections and proposed amendments to said proposed statement of the evidence, and the same were heard and disposed of by the undersigned who directed the state-

ment of the evidence and record relating thereto to be redrafted with such alterations and amendments thereto as were allowed, and the same having been so redrafted and presented to the undersigned, in the full and complete form above appearing, the same is hereby approved by the undersigned to be filed in the office of the Clerk of the said Supreme Court as the statement of the evidence to be included in the record on appeal in the above-entitled cause, including the matters incorporated therein relating to offers of evidence, objections to evidence, and rulings thereon, as a part of said record on appeal allowable [127] in conformity with paragraph (c) of Equity Rule 75.

Dated Honolulu, T. H., February 16, 1923.

[Seal] ANTONIO PERRY,

Associate Justice, Supreme Court, Territory of Hawaii.

Approved (without waiving the objections noted in said record as made by the undersigned):

W. O. SMITH and
L. J. WARREN,

Attorneys for Life Tenants Respondents-Appellees.

W. L. STANLEY,

Attorney for Complainants-Appellees. [128]

Service of the within statement of evidence is hereby admitted this —— day of February, 1923.

_____,

Attorneys for Life Tenants Respondents-Appellees.

_____,

Attorney for Complainants-Appellees.

[Endorsed]: No. 1348. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. H. Focke et al, Complainants, vs. Llewellyn Napela Gay et al., Respondents. Statement of Evidence and Certificate Relating Thereto. Filed February 16, 1923, at 11:55 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [129]

In the Supreme Court of the Territory of Hawaii.

October Term, 1922.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

H. FOCKE and H. M. von HOLT, Trustees Under the Will and of the Estate of JAMES GAY, Deceased,

Complainants,

vs.

LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY, FRIDA GAY, EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor,

Respondents.

Certificate of the Clerk of the Supreme Court of the Territory of Hawaii to the Transcript of Record on Appeal.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petition for appeal, filed June 30, 1922, in the above-entitled cause, the original whereof is attached to the foregoing transcript, being pages 70 to 71, both inclusive, and in pursuance to the praecipe filed December 18, 1922, on behalf of the minor respondents, and of the praecipe filed December 26, 1922, on behalf of the respondents-appellees, to me directed, copies whereof are attached to the foregoing transcript, being pages 99 to 102, both inclusive, and pages 103 to 104, both inclusive, thereof, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 55, both inclusive, AND I CERTIFY [130] the same to be full, true and correct copies of the pleadings, record, entries and opinions which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii in the cause entitled "H. Focke and H. M. von Holt, trustees under the Will and of the Estate of James Gay, deceased, complainants, versus Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay, Frida

Gay; Eva Gay, a minor, Beatrice Gay, a minor, Sonny James Mokuleia Gay, a minor, Michael Vanatta K. Gay, a minor, Albert Gay Harris, a minor, Walter William Holt, a minor, Alice K. Holt, a minor, and Ethel Frida Holt, a minor, Respondents,'' and Numbered 1273.

I FURTHER CERTIFY that pages 56 to 69, both inclusive, pages 80 to 82, both inclusive, and page 92, of the foregoing transcript of record are full, true and correct copies of the pleadings, record, entries, opinions and final decree which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause as above entitled and Numbered 1348.

I DO FURTHER CERTIFY that the Original Assignment of Errors, being pages 72 to 77, both inclusive, the Original Order Allowing Appeal, being pages 78 to 79, both inclusive, the Original Citation on Appeal, with admissions of service of copies thereof by W. L. Stanley, Esq., Attorney for complainants-appellees, and by W. O. Smith, Esq., and L. J. Warren, Esq., attorneys for respondents-appellees, being pages 83 to 85, both inclusive, the Original Order filed July 17, 1922, extending time for preparation and transmission of record to September 30, 1922, being pages 86 to 88, both inclusive; the Original Order filed September 18, 1922, extending time for preparation and transmission of record to November 30, 1922, being pages 89 to 91, both inclusive; the original order filed November 17, [131] 1922, extending time for preparation and transmission of record to December 30,

1922, being pages 93 to 95, both inclusive, the original order filed December 18, 1922, extending time for preparation and transmission of record to February 15, 1923, being pages 96 to 98, both inclusive; the original order filed February 2, 1923, extending time for preparation and transmission of record to April 5, 1923, being pages 105 to 107, both inclusive, and the original statement of evidence, filed February 16, 1923, with the certificate of Hon. Antonio Perry, Associate Justice of the Supreme Court of the Territory of Hawaii to said statement of evidence, being pages 108 to 129, both inclusive, of the foregoing transcript of record, are herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is $80.25, and the said amount has been paid by H. Edmondson, Esq., attorney and guardian *ad litem* for the minor respondents, appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 24th day of February, A. D. 1923.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [132]

[Endorsed]: No. 3989. United States Circuit Court of Appeals for the Ninth Circuit. Eva Gay, a Minor, Beatrice Gay, a Minor, Sonny James

Mokuleia Gay, a Minor, Michael Vanatta K. Gay, a Minor, Llewellyn Napela Gay, a Minor, Albert Gay Harris, a Minor, Walter William Holt, a Minor, Alice K. Holt, a Minor, and Ethel Frida Holt, a Minor, by Harry Edmondson, Their Guardian *Ad Litem,* Appellants, vs. H. Focke and H. M. von Holt, Trustees Under the Will of the Estate of James Gay, Deceased, and Llewellyn Napela Gay, Reginald Eric Gay, Arthur Francis Gay, Alice Mary K. Richardson, Helen Fanny Gay and Frida Gay, Appellees. Transcript of Record. Upon Appeal from the Supreme Court for the Territory of Hawaii.

Filed March 5, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.